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No. 09-528

In The

Supreme Court of the United States

BRIDGEPORT PORT AUTHORITY,
Petitioner,

v.

BRIDGEPORT AND PORT JEFFERSON STEAMBOAT COMPANY, FRANK L. ZAHRADKA, and D&D WHOLESALE FLOWERS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Commerce Clause requires a fee imposed for the use of government-owned facilities to have a dollar-for-dollar correspondence with the benefits conferred on the users under the "fair approximation" test of *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).

2. Whether the Tonnage Clause requires governmental authorities to use all of the fees imposed on ferry passengers for services that directly benefit the passengers when the fees were kept low because the facilities used by the passengers were primarily financed by state and federal grants.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

RULE 29.6 STATEMENT

Bridgeport Port Authority is a quasi-independent agency of the City of Bridgeport, formed under the laws of the State of Connecticut. Connecticut General Statutes §§ 7-329a to 8-329u and Chapter 2.28 of the Bridgeport Municipal Code. Bridgeport Port Authority is not a publicly held corporation that issues stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bridgeport Port Authority respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit appears at Appendix A (App. 1a-20a), and is reported at 567 F.3d 79 (2d Cir. 2009). The opinion of the United States District Court for the District of Connecticut appears at Appendix C (App. 23a-82a), and is reported at 566 F. Supp. 2d 81 (D. Conn. 2008).

JURISDICTION

The court of appeals entered its judgment on May 29, 2009. App. A. The court of appeals denied a timely-filed petition for rehearing on July 31, 2009. App. D.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, provides, in relevant part:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States.

The Tonnage Clause of the United States Constitution, art. I, § 10, cl. 3, provides, in relevant part:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage * * *.

STATEMENT OF THE CASE

Respondents Bridgeport and Port Jefferson Steamboat Company ("Ferry Company"), D&D Wholesale Flowers, Inc., and Frank L. Zahradka filed this action in the United States District Court for the District of Connecticut challenging the validity of a passenger wharfage fee imposed on ferry passengers by the Bridgeport Port Authority. The Ferry Company leases dock facilities from the Port Authority. D&D paid the passenger fee for one of its employees who rode the ferry twice a week since 2001. Zahradka was a ferry passenger.

Respondents alleged that the passenger fee violated the Commerce Clause, U.S. Const., art. I, § 8, cl. 3, because the amount collected exceeded the Port Authority's direct costs of providing services to the passengers. Respondents alleged that the passenger fee also violated the Tonnage Clause, U.S. Const., art. I, § 10, cl. 3, because the revenues from the passenger fees were used for services other than those that directly benefited the passengers.

The jurisdiction of the district court was invoked under 28 U.S.C. §1331.

A. Factual Background

The Port Authority is a quasi-independent agency of the City of Bridgeport, formed in 1993 under the laws of the State of Connecticut and the City of Bridgeport Municipal Code. App. B at 25a-26a. The Port Authority has jurisdiction over the Port District, which includes the Water Street Dock, the Bridgeport Regional Maritime Complex, the Cilco Shipping Terminal, and other port facilities. *Id.* at 26a. The Authority promotes and regulates port facilities and economic development of waterfront areas -- a mission that is typical of port authorities throughout the country. *See id.*

The Ferry Company operates a ferry service between Bridgeport, Connecticut and Port Jefferson, New York. The Port Authority leases the Water Street Dock, a portion of the terminal building, and a staging area for vehicles on the roadway to the Ferry Company. *Id.* at 26a-27a.

Since its inception, the Port Authority has collected a passenger wharfage fee from ferry passengers to recoup the expenses of operating and administering the Port of Bridgeport. *Id.* at 29a. The Ferry Company collects the passenger fee, along with its own ticket charge, from its passengers and, after retaining an amount as compensation for its services, remits the balance of the fees to the Port Authority. *Id.* at 29a-30a. The passenger fee is a relatively small portion of the total ferry ticket price. For example, at the time of trial, the ferry price for a one-way ticket for a vehicle with unlimited passengers was $51.25, while the corresponding passenger fee was $2.75. *Id.* at 29a.

The Port Authority receives no operational funding from the federal government, the State of Connecticut, or the City of Bridgeport. *See id.* at 30a. The Port Authority's budget is financed through several revenue streams, including lease revenue generated from leases with the Ferry Company and Steamboat Concessions, Inc. (a subsidiary of the Ferry Company); leases of other facilities in the harbor such as Derecktor Shipyard; a property management fee from Derecktor Shipyard; dockage fees; and the passenger fee. *Id.* While the Port Authority receives its income from this mix of resources, the passenger fee and the rent generated from lease agreements provide the principal source of revenue for the Port Authority's operational budget. *Id.*

The Port Authority used over $14 million in state and federal grants to build a new (and vastly improved) terminal building, to make bulkhead repairs to the ferry dock, to reconstruct the ferry dock, to improve the access road to the terminal, to prepare to build a parking facility for ferry passengers, and to provide security systems for the terminal. *See id.* at 37a-39a. After completion of these projects, particularly construction of the new terminal building and access road, ferry ridership (and the Ferry Company's profits) increased dramatically. *See id.* at 37a, 48a.

The Port Authority invested in other projects within the Port District, including obtaining grants for dredging the harbor, performing pump-out services to recreational boats to maintain the cleanliness of the harbor, working to expand ferry service by establishing a high-speed ferry from Bridgeport to Stamford and

New York City, and fostering economic development in the Port District. *See id.* at 79a-81a.

During the period covered by the lawsuit, the Port Authority received $9.5 million in passenger fees. *Id.* at 30a.The Port Authority's costs of operations during the same time were approximately $9.86 million. *Id.* at 33a. The district court found that from 46% to 57% of the annual revenues from the passenger fees were used for services that did not directly benefit the ferry passengers. *See id.* at 54a. The court refused to take into consideration the additional $14 million in grants received during this time that were used for improvements to the ferry terminal and associated facilities. *See id.* at 34a, 37a-39a.

The activities that the court refused to consider as benefiting ferry passengers were efforts to promote a high-speed ferry service to Stamford and New York City, pump out services to clean the septic tanks of pleasure craft using the harbor, development of a barge feeder and container facility to relieve congestion on nearby Interstate 95, development projects for a marina and casino, development of the Derecktor Shipyard, a foreign trade zone, the Cilco Terminal providing services to commercial shipping, dredging of the harbor, and various other miscellaneous activities. *Id.* at 40a-46a.

B. Proceedings Below

The district court upheld the Port Authority's right to assess a passenger fee. App. C. Moreover, the court found that the passenger fee does not discriminate against interstate commerce or travel. *Id.* at 56a. But the court held that, to the extent it found the

passenger fee funds activities that do not directly benefit the ferry passengers, the fee violates the Commerce Clause and Tonnage Clause. *Id.* at 56a-69a.

The district court limited the facilities for which the Port Authority could charge a fee to ferry passengers to the Water Street Dock, terminal building and access road, as opposed to the Port District as a whole. With this limitation, the district court found the passenger fee was excessive because it did not fairly approximate the cost of operating the ferry terminal and associated facilities. *Id.* at 61a-65a. The district court examined in detail the Port Authority's activities (including such minutiae as the subject matter of phone calls by administrative staff). *Id.* at 37a-46a. The district court eliminated the expenditures it deemed to not benefit ferry passengers, and concluded that from 46% to 57% of the fees were used for such activities. *Id.* at 54a. The district court also found that the passenger fee partially violated the Tonnage Clause because the Port Authority used the revenue for projects unrelated to any use by the ferry passengers. *Id.* at 67a-69a.

The district court entered a permanent injunction prohibiting the Port Authority from further use of the passenger fee revenues to fund activities that are "unrelated to and do not benefit the ferry passengers or approximate their use of the Port." App. B, App. C at 80a-81a. The district court further enjoined the Port Authority from collecting the passenger fee "in an amount that exceeds what is necessary for expenses that benefit ferry passengers and fairly approximate their use of the Port." *Id.*

The court held that the Ferry Company failed to prove that it was damaged but awarded the Ferry

Company nominal damages of $1. *Id.* at 76a-78a. The court awarded D&D damages of $494.63, representing what the court found to be the excessive portion of the passenger fees it paid for its employee's use of the ferry terminal and facilities. *Id.* at 78a. The court awarded no monetary relief to Zahradka because he withdrew his claim for damages and did not appear at trial. *Id.* at 25a n.3.

A two-member panel of the Second Circuit affirmed the district court's judgment.[1] App. A. The court agreed that, while the Port Authority may assess a passenger fee, a portion of the passenger fee violated the Commerce Clause. App. A at 14a-18a. The court held that the fair approximation and the excessiveness criteria "substantially overlap" because the passenger fee supports "virtually the entirety of the Port Authority's operating budget." *Id.* at 14a. Even though the court questioned the district court's finding that certain expenditures did not benefit the ferry passengers, *e.g.*, dredging the harbor and pump-out service for recreational boats, it nevertheless affirmed the exclusion of these expenses from the permissible passenger fee. *See id.* at 17a-18a. The court further affirmed the judgment that, to the extent the Port Authority used the passenger fee revenue for activities that were not found to directly benefit the ferry passengers, it violated the Tonnage Clause as well. *Id.* at 18a-20a.

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[1] The appeal was decided by the remaining two panel members after the Hon. Guido Calabresi recused himself before oral argument.

REASONS FOR GRANTING THE PETITION

The Court should grant review because the decision below conflicts with *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). *Evansville* cautioned that the courts should give broad discretion to a governmental entity's determination of the proper use for and the amount of a fee charged for use of its facilities. In that regard, *Evansville* required only that the fee imposed be a "fair approximation" of the cost of operating the facility and not be excessive in comparison with the government benefit conferred. And *Evansville* did not require that fee be used only for the operation of that part of the government-owned facility that the payers of the fee directly used.

Here, the courts below refused to give deference to the Port Authority's determination of the proper passenger fee. The district court acknowledged that its decision went further than any other federal court to regulate and control how a government authority allocates the revenue collected from a reasonable user fee. App. C at 66a. And, indeed, the district court scrutinized every expenditure as if it were conducting an audit, instead of deciding whether the fees reflected a "fair, if imperfect, approximation" of the cost of the use of the facilities. *See, e.g., Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 369 (1994).

This procedure converted the fair approximation test to one that required instead that the Port Authority demonstrate a dollar-for-dollar correspondence between the fee charged and the services provided to the ferry passengers. And in reaching the conclusion that the user fees exceeded the

direct benefit to the passengers, the courts below ignored the $14 million in state and federal grants used to improve the dock and other facilities used by the passengers that otherwise would have had to have been paid for by increased passenger fees. Thus, the Port Authority was punished for successfully obtaining alternate sources of funds that directly benefited the passengers, but avoided additional direct charges to them.

The finding that a portion of the passenger fee violated the Tonnage Clause also conflicts with the Supreme Court decision in *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935). Until this decision, federal courts interpreted *Clyde Mallory* to allow state and local authorities to impose fees in exchange for general services, even where the revenue collected exceeds the expenses spent on the vessel's behalf. Moreover, the decision below failed to take into account the benefits the Port Authority's state and federal grants provided to the ferry passengers by paying for significant upgrades to the ferry terminal and facilities without charging a corresponding increase in fees.

But for the grants the Port Authority would have had to increase the passenger fees by more than 50% to raise the cash necessary to finance the terminal improvements. Taking all of the Port Authority's expenditures into account, over 80% of its total income -- $14 million in grants and the approximately $4.25 million in fees – was spent on the facilities that the court found directly benefited the passengers.

In view of these benefits along with the other services provided by the Port Authority, the fees did

not exceed the total cost of operating and maintaining the facilities that benefit the passengers and represented a fair approximation of the benefits the passengers received from all of the Port Authority's activities.

I. The Court Should Grant Review Because The Decision Conflicts With This Court's Dormant Commerce Clause Analysis in *Evansville*.

The Court should grant review because the decision below conflicts with the dormant Commerce Clause test approved in *Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc.*, 405 U.S. 707 (1972) by significantly expanding the federal courts' oversight of local finance decisions, while at the same time narrowing the "fair approximation" test to require, in effect, a dollar-for-dollar correspondence between user fees and benefits.

The test to determine whether a user fee imposed by a government authority is valid under the Commerce Clause is well-established. A user fee may be appropriately charged under the Commerce Clause if it: (1) is based on some fair, if imperfect, approximation of use or privilege for use of the facilities for whose benefit it is imposed; (2) does not discriminate against interstate commerce; and (3) is not excessive in comparison to the governmental benefit conferred. *See Evansville*, 405 U.S. at 716-17.

The district court acknowledged that its decision was contrary to "the great majority of the courts that have previously considered similar user fees have reached the opposite conclusion and given the government authorities wide discretion to spend user

fees." App. C at 66a. The decisions below that the Port Authority's allocation of the passenger fee is not a fair approximation of the passengers' use of the facilities and "exceeds permissible bounds" is at odds with this Court's approval of similar fees in *Evansville*.

In *Evansville*, the Court found that the passenger fee assessed by the New Hampshire airport authority was constitutional even though only fifty percent of the passenger fee revenue was allocated to the state aeronautical fund. *See Evansville*, 405 U.S. at 720. The remaining "fifty percent was allocated to the municipalities or airport authorities owning the landing areas at which the fees were imposed in the form of unrestricted general revenues." *Id.*

The key is not whether the funds collected are allocated to a specific fund for the benefit of the users. "[S]o long as the funds received by local authorities under the statute are not shown to exceed their airport costs, it is immaterial whether those funds are expressly earmarked for airport use." *Id.* at 720.

The Second Circuit held that any part of the fee that went to a facility or activity that was not directly enjoyed by or that could not be directly enjoyed by the ferry passengers "is not a fair approximation of the use of the facilities supported by the fee and is also excessive in relation to the benefits enjoyed or available to be enjoyed by the passengers." App. A at 14a. This directly conflicts with this Court's rejection of the same approach taken by the Indiana Supreme Court in *Evansville*.

The Indiana court invalidated the tax imposed on certain commercial passengers because they were

subject to the tax regardless of the extent to which they used the airport facilities. *See Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 265 N.E. 26, 29-30 (Ind., 1970). But, in reversing, the Court held that the tax was valid, even though some of the expenses conferred no benefit at all on airline passengers. *Evansville*, 405 U.S. at 717-18. For example, the airport authority used the tax revenue to pay for "other facilities" such as private hangar facilities and nonscheduled airline hangar facilities which airline passengers would never use. *See Evansville*, 265 N.E. at 29. The Court looked at the operations of the entire airport as the appropriate facility against whose costs the revenues were to be measured, not just the part of the airport used only by airline passengers. The injunction here, by contrast, prohibits the Port Authority from using the passenger fee for any activities except those that directly benefit the ferry passengers, including limiting phone calls by Port Authority staff.

II. The Court Should Grant Review Because the Second Circuit Decision Conflicts With The Court's Tonnage Clause Analysis in *Clyde Mallory*.

The Court should also grant review of whether the same portion of the passenger fee the court found to violate the Commerce Clause also violates the Tonnage Clause. While the standard under the Tonnage Clause is expressed differently than under the Commerce Clause, its effect is the same. The Tonnage Clause prohibits reliance on tonnage duties to "raise general revenues, to regulate trade, or to charge for the privilege of entering, lying in, or trading in a port" but it does not prohibit reasonable charges for general port

services, even if the particular user does not use those services. *New Orleans Steamship Ass'n v. Plaquemines Port*, 874 F.2d 1018, 1020, 1023 (5th Cir. 1989); *see also Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 265-67 (1935).

A "reasonable charge" for services rendered is one for which "[b]enefits and fees have been apportioned as closely as practicable." *See Plaquemines Port, Harbor and Terminal Dist. v. Federal Maritime Commission*, 838 F.2d 536, 545 n.8 (D.C. Cir. 1988) (noting a slight divergence between the class that benefits and the class that pays is of no significance under *Clyde Mallory*).

In contrast to the Second Circuit's strict refusal to consider any expenditure that did not directly benefit the ferry passengers, other federal courts have approved fees imposed by state and local authorities to fund general services such as vessel safety, movement of vessels in the harbor, port facilities, parking, trash disposal, security and harbor maintenance, and improvement. *See, e.g., Barber v. Hawaii*, 42 F.3d 1185, 1196 (9th Cir. 1994); *Captain Andy's Sailing, Inc. v. Johns*, 195 F.Supp.2d 1157, 1175 (D. Haw. 2001). In *Johns*, for example, the court held that a fee assessed to vessels for harbor maintenance was valid under the Tonnage Clause, even though the fees collected were nearly ten times higher than the expenses made on the vessel's behalf. *See id.* at 1175.

By focusing on a strict cost-benefit ratio, the Second Circuit failed to properly evaluate whether the passenger fee "fairly remunerates" the Port Authority for the cost of the services provided to the ferry passengers as a whole. *See Northwest Union Packet*

Co., v. City of St. Louis, 100 U.S. 423, 427 (1879). Instead, the court used the Tonnage Clause to place the judiciary as the regulator of the Port Authority and to oversee each expenditure it makes.

Through state and federal grants, the Port Authority provided benefits and services that included the construction and maintenance of the terminal building, provision of port security, development for parking, and creation of the new access road. Although the passengers did not pay for these costs through an increased passenger fee, they received the benefits of the Port Authority's efforts. This allowed the Port Authority to keep the passenger fee low, but the trade-off for the low passenger fees was the use of part of them to pay for improvements and development of other areas of the port that the ferry did not directly use.

The passenger fee represented about 40% of the costs incurred by the Port Authority in providing all of the benefits and services enjoyed by the passengers. By simply excluding the services that the district court found were not directly used by the ferry passengers, and by ignoring the significant benefits the Port Authority provided to the passengers through grant revenues, the Second Circuit wrongly concluded that a portion of the passenger fee was raised for general revenues and, thus, violates the Tonnage Clause.

The Court recently examined the application of the Tonnage Clause to a local property tax assessed against oil tankers and certain other vessels. *Polar Tankers, Inc. v. City of Valdez*, -- U.S. --, 129 S. Ct. 2277, 174 L. Ed. 2d 1 (2009). Unlike the property tax in *Polar Tankers*, however, the passenger fee assessed

by the Port Authority is not deposited into the City's coffers to fund general municipal services. The revenues are used to support the Port Authority's operations at the port. Thus, *Polar Tankers* does not modify the rule of *Clyde Mallory* that a local government entity can charge for port services, even if the particular ship does not use those services.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 08-3886-cv

August Term 2008
Heard: December 23, 2008
Decided: May 29, 2009

BRIDGEPORT AND PORT JEFFERSON STEAMBOAT COMPANY, FRANK C. ZAHRADKA, and D & D WHOLESALE FLOWERS, INC.,
Plaintiffs-Appellees,

v.

BRIDGEPORT PORT AUTHORITY,
Defendant-Appellant.

Before: NEWMAN and SACK, Circuit Judges.*

Appeal from the July 8, 2008, judgment of the United States District Court for the District of

* Honorable Guido Calabresi, originally a member of the panel, recused himself before oral argument, and the appeal is being decided by the remaining panel members, who are in agreement. See 2d Cir. R. § 0.14(b).

Connecticut (Christopher F. Droney, District Judge), declaring a fee imposed on ferry passengers unconstitutional under the Commerce Clause and the Tonnage Clause, and enjoining collection of the fee until revised.

Affirmed.

Timothy F. Noelker, St. Louis, Mo., (James W. Erwin, Ryan K. Manger, Thompson Coburn LLP, St. Louis, Mo.; Richard L. Rose, Everett E. Newton, Murtha Cullina LLP, Stamford, Conn., on the brief), for Defendant-Appellant.

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(Steven E. Bers, Whiteford, Taylor & Preston LLP, Baltimore, Md. for amicus curiae Nat'l Ass'n of Passenger Vessel Owners, Inc., in support of Plaintiffs-Appellees.)

JON O. NEWMAN, Circuit Judge.

This appeal concerns the constitutionality of a fee imposed on passengers traveling by ferry from Bridgeport, Connecticut, across Long Island Sound to Port Jefferson, New York. The fee is alleged to violate the Commerce Clause, the constitutional right to travel, and the rarely litigated Tonnage Clause, as well as federal and state statutes. The Defendant-Appellant

Bridgeport Port Authority ("BPA") appeals from the July 8, 2008, judgment of the District Court for the District of Connecticut (Christopher F. Droney, District Judge), in a suit brought by the Plaintiffs-Appellees Bridgeport & Port Jefferson Steamboat Company (the "Ferry Company"), D & D Wholesale Flowers, Inc. ("D&D"), and Frank Zahradka. Greg Rose, the owner of D & D, and Zahradka are regular ferry passengers. The judgment declared the fee unconstitutional under both the Commerce Clause and the Tonnage Clause, enjoined its collection, and awarded nominal damages to the Ferry Company and modest damages to D&D. We affirm.

Background

The BPA. The BPA is a quasi-public entity created in 1993, pursuant to a state statute that authorizes Bridgeport to establish a port authority, see Conn. Gen. Stat. § 7-329a, and the City of Bridgeport Municipal Code. The Municipal Code gives broad definition to the BPA's purposes, which include "to foster and stimulate the shipment of freight and commerce through the ports," "to develop and promote port facilities with the district in order to create jobs, increase the city's tax base and provide special revenues to the city," and to work with the City "to maximize the usefulness of available public funding." The BPA's independent auditors' report also describes the BPA's purposes broadly, including "to develop strategies and initiatives to promote and create port facilities within the district, [and] participate in the economic development of the harbor and waterfront areas."

The BPA has jurisdiction over a geographic area known as the Port District. The Port District extends approximately 1,000 feet inland from the waterways of Bridgeport Harbor, Black Rock Harbor, and their navigable waters and tributaries, excluding residential property and park lands. The BPA also has jurisdiction over certain lands outside the 1,000-foot limit. Located within the Port District are the Water Street Dock (the "Dock"), the Cilco Shipping Terminal, the 50-acre Steel Point Peninsula, and the 48-acre Bridgeport Regional Maritime Complex ("BRMC"), which includes the Derecktor Shipyard.

The BPA is directed by a five-member Board of Commissioners, three of whom are appointed by the mayor of Bridgeport and two of whom serve by virtue of their positions as the City's Director of Economic Development and Harbor Master. The BPA is managed by an executive director and staff.

When the BPA was created in 1993, the City of Bridgeport transferred control over the Dock to the BPA under a property management agreement. The Dock facilities were in very poor condition prior to the BPA's existence. The Harbor Master at the time described them as "deplorable"; "[t]he dock was just a [mishmash] of steel plates over various holes, rotted timbers. . . . At night, . . . the place was just a haven for people breaking into cars, prostitution." At that time, the terminal consisted of a concrete block building that housed two poorly maintained restrooms and a small office. There were no food facilities or other concessions and no waiting areas for passengers.

With government grant money, the BPA built a new ferry terminal, which was completed in 1996. The

District Court found that the new terminal building was "a dramatic improvement from the preexisting structure." It had two floors: the ground floor had a public waiting area, restrooms, information counter, cafeteria, and small office; the second floor, which was not open to the public, housed the BPA and the offices of the Connecticut World Trade Association, a reception area, conference room, and several other offices.

Since its inception, the BPA has obtained government grants to fund many other development projects in the Port District that have contributed to the revitalization of the area.

Passenger plaintiffs. Rose and Zahradka were recruited to be plaintiffs in this case by the Ferry Company's vice-president and general manager Frederick Hall.[1] The Ferry Company paid the legal fees and expenses for both individuals.

The Ferry Company. The Ferry Company is a privately owned company that has been providing vehicle and passenger ferry service between Bridgeport and Port Jefferson since 1883. Its president, Brian McAllister, has owned a 100 percent interest in the Ferry Company since 1980. Currently, the Ferry Company owns and operates three ferry boats. In 2005, the Ferry Company transported approximately 460,000 vehicles and one million passengers.

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[1] Zahradka withdrew his claim for past damages but remains a plaintiff for purposes of prospective relief.

On the Port Jefferson side, the Ferry Company owns most of the dock and terminal facilities and provides all ferry-related services. Neither the Ferry Company nor its passengers pay a user fee to any government agency in Port Jefferson.

On the Bridgeport side, however, the Ferry Company does not own the dock or terminal facilities. Until 1993, the Ferry Company leased the use of the Dock from the City of Bridgeport. When the City transferred control of the Dock to the BPA, the Ferry Company entered a lease to rent the Dock from the BPA at an annual rate, which was $100,000 for the first year and increases to $158,956 through 2011.

The lease agreement entitles the Ferry Company to "non-exclusive preferential use" of the Dock. The BPA reserved for itself all other uses of the Dock and the premises, except for the following: operation of the food concession, which was the subject of another agreement between the parties; use of office and waiting room space in the two-story terminal building that the BPA "may from time-to-time make available"; and use of a few parking spaces for Ferry Company employees.

Before and after the creation of the BPA, the Ferry Company has been responsible for running daily ferry operations at the Dock. The Ferry Company employs a Dock Manager and a staff of 15 to 22 to handle all docking and undocking of ferries, staging of vehicles on the roadway to board, directing passengers and vehicles on and off the ferries, shuttling passengers to and from the parking lots, and removing snow on the Dock. Ferry Company employees also perform security functions at the Dock.

The passenger fee. Since its inception in 1993, the BPA has imposed a passenger fee on all persons and vehicles embarking on, or disembarking from, the Ferry Company ferries at the Dock. The amount of the fee varies depending on whether the passenger is a person, a car, a truck, or a bus. In 1993, the fee for an adult foot passenger was 50¢ and for a vehicle, $1.00. In 2003, the fee for an adult foot passenger was $1.00 and for a vehicle including a driver, $2.00. In February 2006, the BPA began assessing a one-dollar surcharge to cover the BPA's fees and costs in this litigation.

The fee is a relatively a small portion of the total ferry ticket price. For example, in 2005, a one-way ferry ticket for a vehicle with unlimited passengers was $51.25, while the corresponding passenger fee was $2.75. The fee is added to the ticket price and collected by the Ferry Company on behalf of the BPA at the time passengers purchase their ferry tickets on board.[2] For this service, the BPA pays the Ferry Company an administrative fee, which was $22,500 per year until May 2003 when it was increased to $32,500. After retaining its administrative fees, the Ferry Company remits the proceeds of the passenger fee to the BPA on a monthly basis, along with a written report of the number of tickets sold and the amounts collected from each type of passenger.

The BPA's revenue and expenses. From 1993 to 2004, the BPA collected a total of approximately $9.5

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[2] The Ferry Company has refused to collect the $1 litigation surcharge on the BPA's behalf, and the BPA has hired a firm to collect the surcharge directly from passengers embarking or disembarking from the ferry.

million in passenger fees and more than $1 million in rental revenues from the lease agreements with the Ferry Company and its food concession subsidiary. The passenger fee and ferry leases are almost the sole source of operating revenue for the BPA. Until 2002, the passenger fee and lease revenue exceeded the total operating expenses of the BPA. As the District Court noted, "[T]he total amount of Passenger Fees collected alone from 1993 to 2004 correlates very closely with the Port Authority's total operating expenses during the same period." The BPA's executive director admitted that the BPA has used the revenue from the passenger fee and the Dock lease to pay for essentially all of its operating expenses, including all salaries, health benefits, pension payments, payroll taxes, telephone, utilities, office equipment, travel, charitable contributions, and automobile and lease expenses.

The District Court's decision. The District Court, relying on the Supreme Court's so-called "dormant" Commerce Clause jurisprudence, see United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330, 338 (2007), endeavored to apply the test the Supreme Court has set forth for determining the constitutionality of fees imposed by governmental entities to defray the costs of facilities used by those engaged in interstate commerce. The test was first announced in Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., 405 U.S. 707 (1972), involving an airport user fee imposed on commercial airlines. The Supreme Court stated that

> a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and

> maintenance may constitutionally be imposed . . . so long as the toll is based on some fair approximation of use or privilege for use . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred.

Id. at 714, 716-17.

In Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355 (1994), the Supreme Court reformulated its Evansville standard into a three-pronged test. "[A] levy is reasonable under Evansville if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce." Id. at 369.

In the pending case, the District Court ruled that the third criterion was satisfied because the passenger fee did not distinguish between intrastate and interstate travel. However, the Court ruled that the fee did not meet either the first or second Evansville criteria.

The Court stated that the fee was not based on a fair approximation of the ferry passengers' use of the port facilities because it was "calculated according to a method which ensures the Passenger Fee revenue will cover all of the Port Authority's operating costs and development projects throughout the Port District," and "many" of the "Port District activities funded by the fee are not even available to the ferry passengers (such as Derecktor, BRMC, harbor dredging, the barge feeder service, and the foreign trade zone)."

The Court also ruled "that the Passenger Fee is excessive in comparison with the government benefit conferred and in relation to the costs incurred by the taxing authority." Distinguishing the airport user fee upheld in Evansville, the Court stated that "the vast majority of airport development is intended to benefit the passengers traveling on airplanes leaving the airport, or to facilitate their air travel; the Port District, however, includes many projects beyond the Dock that are not functionally related to the ferry operation, and are not intended to benefit the travelers on ferries, or to facilitate their boat travel from Connecticut to Long Island."

To determine whether the revenue from the Passenger Fee was unreasonably high compared to the benefits that the BPA provided to the ferry passengers, the District Court examined separately each activity of the BPA. The Court concluded that the following BPA activities benefitted ferry passengers: (1) construction and maintenance of a new ferry terminal building, (2) repair of the bulkhead of the Dock, (3) construction of the access road, (4) planning of the parking facility for ferry passengers, (5) security for the Dock, and (6) daily operations related to the ferry.

On the other hand, the Court found that the following activities did not benefit ferry passengers: (1) development projects on Steel Point Peninsula; (2) development projects on the BRMC and the leasing of a portion of the BRMC to Derecktor Shipyards; (3) establishing a high-speed ferry from Bridgeport to Stamford and New York City; (4) developing a barge-feeder service that would ship containers by barge from the Port of New York and New Jersey to Bridgeport; (5) operating a foreign trade zone in

Bridgeport; (6) activities at the Cilco commercial shipping terminal located on land near the BRMC; (7) dredging the Bridgeport harbor; (8) operating a complimentary pump-out service for pleasure boats; (9) BPA review of other projects within the Port District; and (10) some miscellaneous activities, including payment of attorneys to register a new trademark for the BPA and purchasing season tickets to local minor league teams.

Having made this analysis of the BPA's expenditures, the Court determined that the passenger fee revenue collected by the BPA substantially exceeded the amount of money spent by the BPA for those activities that benefitted the ferry passengers. That determination led the Court to conclude that the fee violated the Commerce Clause and the constitutional right to travel, which the parties agreed was subject to the same standards applicable to the Commerce Clause.

The Court also concluded that the excessive nature of the fee, in relation to benefits conferred, rendered the fee in violation of the Tonnage Clause, which provides that "[n]o State shall . . . lay any Duty of Tonnage." U.S. Const. art. I, § 10, cl. 3. The Court noted that the Supreme Court in Clyde Mallory Lines v. Alabama, 296 U.S. 261, 265-66 (1935), held that the prohibition on all "charge[s] for the privilege of entering, trading in, or lying in a port" did not extend to "charges . . . for services rendered to and enjoyed by the vessel." The District Court concluded that the passenger fee violated the Tonnage Clause of the Constitution because it was "used for the impermissible purpose of raising general revenues and for projects which do not and could not benefit the

ferry passengers." The passenger fee revenue "fund[ed] projects completely unrelated and unavailable to the fee payers, such as negotiations, legal fees, and development proposals for the BRMC, Derecktor, the foreign trade zone, the barge feeder service, harbor dredging, and the high-speed ferry." As such, it was an impermissible fee of tonnage.[3]

Turning to the appropriate remedy, the District Court first determined that, although the Ferry Company could have suffered an economic loss quantifiable in damages, the Ferry Company had failed to provide any non-speculative evidence of its damages. The Court then found that the passenger plaintiff D & D was entitled to $494.63, based on the extent to which the passenger fee revenue was excessive compared to the benefits to ferry passengers. Finally, the Court ruled that the plaintiffs were entitled to an injunction prohibiting the BPA from collecting a passenger fee in an amount that exceeded what was necessary to pay for benefits to the ferry passengers.

Discussion

I. Standing

Initially, we consider the BPA's contention that the Ferry Company lacks standing because it failed to show injury-in-fact. Incorrectly assuming that injury-in-fact requires quantifiable damages, the BPA

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[3] The District Court rejected the plaintiffs' claims under federal and state statutes, and those claims are not pursued on this appeal.

argues that because the district court did not award the Ferry Company any compensatory damages, it suffered no injury. But as this Court explained in Ross v. Bank of America, 524 F.3d 217 (2d Cir. 2008), lack of compensatory damages "does not negate standing." Id. at 222 (internal quotation marks omitted).

As the Ferry Company argued, it sustained injuries in the following respects:

(1) The added cost to its passengers reduces both demand for ferry services and the Ferry Company's revenue. Although the District Court found that the Ferry Company failed to present sufficient evidence to establish quantifiable damages, the Court noted that "[i]t is undisputed that the price elasticity for the ferry service is greater than zero but less than one, indicating on a theoretical level that a change in price at a given point in time would lead to slightly decreased demand."

(2) The fee requirement obliges the Ferry Company, as a practical matter, to collect the passenger fee and remit the proceeds to the BPA.

(3) The Ferry Company adequately pleaded that its individual rights under the Commerce Clause are being violated. See Dennis v. Higgins, 498 U.S. 439, 449 (1991) (noting that the Commerce Clause creates an individual right); see also Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 320 n.3 (1977).

(4) The Ferry Company adequately alleged that it is exposed to future injury, which would entitle it to injunctive relief.

The Ferry Company also satisfies the requirements of prudential standing because (a) it sustained its own injury and thus asserts its own rights, not those of the passengers, (b) it does not assert a general grievance, in view of its special relationship with its customers, and (c) it operates an interstate ferry service and thus falls within the zone of interest protected by the Commerce Clause.

The BPA's challenge to the Ferry Company's standing is without merit.

II. Commerce Clause

The parties do not dispute that the passenger fee satisfies the first prong of the Evansville test; the fee does not discriminate against interstate commerce. The BPA contends, however, that the fee is based on a fair approximation of the ferry passengers' use and that it is not excessive in relation to the benefits conferred on them. In this case, the "fair approximation" and the "excessiveness" criteria substantially overlap. The reason is that the passenger fee supports virtually the entirety of the BPA's operating budget. If, as the District Court ruled, some of the BPA's expenses confer no benefit on the ferry passengers, either enjoyed or available to be enjoyed, then to that extent the fee, imposed solely on ferry passengers, is not a fair approximation of the use of the facilities supported by the fee and is also excessive in relation to the benefits enjoyed or available to be enjoyed by the passengers.

The BPA correctly argues that there need not be a perfect fit between the use of the facilities and the support of those facilities by the fee, see United States

v. Sperry Corp., 493 U.S. 52, 60 (1989) ("This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services."), but the discrepancy here exceeds permissible bounds. The point emerges from a comparison of the airport cases with this case. In Evansville, embarking commercial airline passengers were the only payers of the user fees at issue–other classes of passengers (and non-passengers) were exempt. The Court concluded that those commercial airline passengers reasonably bore that share of airport costs because it was they who enjoyed the principal benefit of "facilities built primarily to meet [their] needs." 405 U.S. at 718-19. Furthermore, although the airlines did not use every facility located anywhere in the airport (for example, the lounges for v.i.p. airlines passengers), the benefit derived from having the entire airport operating made a fee based on airline traffic into the airport reasonable. Similarly, in Alamo Rent-a-Car, Inc. v. Sarasota-Manatee-Airport Authority, 906 F.2d 516 (11th Cir. 1990), the operation of the airport provided a benefit to the car rental company located near, but unlike some of its competitors, not at, the airport, and the Eleventh Circuit therefore rejected the company's claim that it should be charged only for use of the road leading from its location to the airport. See id. at 519.

By contrast, in the pending case, the Port District is not a facility whose existence and entire operation benefit the ferry passengers. The BPA is a governmental unit created to accomplish a variety of tasks, only some of which afford actual or potential benefits to ferry passengers. Had the Dock and some of the related activities been operated directly by the City of Bridgeport, it could not be seriously maintained

that a passenger fee could be used to pay a portion of Bridgeport's school or welfare expenses. The limits of both a fair approximation of use and excessiveness are plainly exceeded when the fees support a BPA budget that includes, for example, a development project for reducing traffic on I-95, the interstate highway running generally along the Connecticut shore. No doubt those ferry passengers who drive to or from the Dock along I-95 are grateful for any reduction in traffic, but they would be equally grateful for whatever steps the BPA or the City of Bridgeport might take to reduce air pollution or otherwise improve the environment along I-95. Such quality-of-life improvements cannot be said to confer an actual or potential benefit to the ferry passengers as users of the ferries and thus exceed the bounds of what may reasonably serve as the basis for the BPA's fee.

A user fee, however, may reasonably support the budget of a governmental unit that operates facilities that bear at least a "functional relationship" to facilities used by the fee payers. See Automobile Club of New York, Inc. v. Port Authority, 887 F.2d 417, 421 (2d Cir. 1989). In that case, this Court held that a "functional relationship" existed between the Port Authority's cross-river PATH train and its bridges and tunnels (Lincoln Tunnel and Holland Tunnel), justifying inclusion of the PATH in the rate base of the tolls that the Port Authority charged on its bridges and tunnels, and rendering the tolls "just and reasonable" under the Federal-Aid Highway Act.

In the pending case, once it appeared that the passenger fees were supporting the entirety of the BPA's operating budget and that this budget was supporting some BPA activities of no benefit to the

ferry passengers (at least, not in their capacity as ferry passengers), the District Court had no choice but to make particularized inquiries as to the various BPA expenditures. Activities properly deemed of no actual or potential benefit to the ferry passengers are (1) development projects on Steel Point Peninsula, (2) development projects on the BRMC and the leasing of a portion of the BRMC to Derecktor Shipyards, (3) establishing a high- speed ferry from Bridgeport to Stamford and New York City, (4) developing a barge-feeder service that would ship containers by barge from the Port of New York and New Jersey to Bridgeport, (5) operating a foreign trade zone in Bridgeport, (6) activities at the Cilco commercial shipping terminal located on land near the BRMC, and (7) some miscellaneous activities, including payment of attorneys to register a new trademark for the BPA and purchasing season tickets to local minor league teams.

Slightly closer questions are presented by the District Court's disallowance of the portion of the fees that supported dredging the Bridgeport harbor and operating a complimentary pump-out service for pleasure boats. Since the harbor was already sufficiently deep to accommodate the ferries, the Appellees contend that they derive no benefit from additional dredging. However, they do benefit from minimizing the risk that larger vessels will run aground for lack of additional dredging and block use of the harbor by the ferries. Similarly, the appellees contend that they derive no benefit from complimentary pump-out services for pleasure boats, but the resulting reduction of pollution in the harbor is a benefit to the ferry passengers.

Although using a portion of the passenger fees to pay for these two services, which provide some benefit to ferry boat passengers, does not render the passenger fees excessive, it does fail to satisfy the fair approximation test. There is nothing in the record to indicate how the portion of dredging costs borne by the ferry passengers compares to the costs, if any, borne by large vessels docking at Bridgeport. And because the pump-out service is available to and benefits only the pleasure boats and only minimally benefits the ferry passengers, imposing the total cost on them through the passenger fee with no charge on the pleasure boats is not a fair approximation of use.

In sum, the District Court properly concluded that the existing fee violated the Commerce Clause and required an adjustment.

III. Tonnage Clause

The Tonnage Clause provides that "[n]o State shall . . . lay any Duty of Tonnage." U.S. Const. art. 1, § 10, cl. 3. As interpreted by the case law, the Tonnage Clause "prohibits . . . duties to raise general revenues." New Orleans Steamship Association v. Plaquemines Port, Harbor & Terminal District, 874 F.2d 1018, 1023 (5th Cir. 1989). Moreover, it requires that benefits and fees be "apportioned as closely as is practicable," Plaquemines Port, Harbor & Terminal District v. Federal Maritime Commission, 838 F.2d 536, 545 n.8 (D.C. Cir. 1988), and that the service be available to all fee payers, Clyde Mallory Lines, 296 U.S. at 266.

The District Court correctly applied the law to the facts in holding that "[t]he Passenger Fee imposed by the Port Authority is used for the impermissible

purpose of raising general revenues and for projects which do not and could not benefit the ferry passengers." The testimony of the BPA's own expert and officials supports the Court's conclusion. John Arnold, the BPA's expert, testified that the BPA "act[s] as an incubator for growth of economic activity that supports the city itself"; the BPA's accountant testified that non- ferry projects benefit the City and "the entire community"; a commissioner of the BPA testified that the purpose of passenger fee has always been "to create a source of revenue to support the operations of the Port Authority." Finally, the BPA's executive director Riccio testified, "I think anything that helps business and commerce in the State of Connecticut is going to indirectly benefit the ferry passengers." When asked whether it is fair to fund his travel expenses related to the BPA's non--ferry activities, Riccio testified "We don't work for the Port Jefferson Ferry Company or the Port Jefferson ferry passengers. We're a Port Authority and this is what we do. We're developing the port as our mission, bringing other maritime interest and businesses to the Port of Bridgeport." Based on these facts, the district court did not err in its legal conclusion.

In addition, the passenger fee offends the Tonnage Clause because the BPA's non-ferry services are not available to ferry passengers; they were "completely unrelated and unavailable to the fee payers." Charging the fee-payers for services that are not available to them is impermissible under the Tonnage Clause, even if not all fee payers actually use them. See Plaquemines, 838 F.2d at 545.

Conclusion

The judgment of the District Court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No.: 3:03CV599 (CFD)

[Filed July 8, 2008]

BRIDGEPORT AND PORT JEFFERSON STEAMBOAT COMPANY et al.,
Plaintiffs,

v.

BRIDGEPORT PORT AUTHORITY,
Defendant.

JUDGMENT

This action came to trial by the court, before the Honorable Christopher F. Droney, United States District Judge. The issues having been tried and in accordance with the Court's July 3, 2008 Memorandum of Decision, the plaintiff Bridgeport & Port Jefferson Steamboat Company is awarded nominal damages in the amount of one dollar, and the plaintiff D&D Flowers is awarded damages in the amount of $494.63 and further,

The Port Authority is enjoined from the further use of the revenues from the Passenger Fee to fund its

activities that are unrelated to and do not benefit the ferry passengers or approximate their use of the Port, and the Passenger Fee shall be reduced accordingly. The Port Authority shall not be allowed to collect a Passenger Fee in an amount that exceeds what is necessary for their expenses that benefit ferry passengers and fairly approximate their use of the Port, it is therefore

ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered as stated above.

Dated at Hartford, Connecticut, this 8th day of July, 2008.

ROBIN D. TABORA, Clerk

By_____/s/LIK_____
Linda I. Kunofsky
Deputy-in-Charge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 3:03 CV 599 (CFD)

[Filed July 3, 2008]

BRIDGEPORT AND PORT JEFFERSON STEAMBOAT COMPANY et al.,
Plaintiffs,

v.

BRIDGEPORT PORT AUTHORITY,
Defendant.

MEMORANDUM OF DECISION

I. Introduction

This action was brought by the Bridgeport and Port Jefferson Steamboat Company (the "Ferry Company"), a corporation that provides a public ferry service for passengers and vehicles between Bridgeport, Connecticut and Port Jefferson, New York, and by two of its frequent passengers (collectively the

"plaintiffs"),[1] against the Bridgeport Port Authority (the "Port Authority"). The Ferry Company leases dock facilities in Bridgeport for its ferry boat operation from the Port Authority. The subject of this action is the validity of a passenger wharfage fee ("Passenger Fee") that the Port Authority imposes on all ferry passengers. The Passenger Fee - which has been in effect since 1993 - is collected by the Ferry Company and then turned over to the Port Authority.[2] The plaintiffs challenge the legality of the Passenger Fee, claiming it violates the Commerce Clause of the U.S. Constitution, the right to travel under the U.S. Constitution, the Tonnage Clause of the U.S. Constitution, the Rivers and Harbors Appropriation Act of 1884, and several Connecticut statutes. The plaintiffs also asserted a claim for unjust enrichment. The basis for these claims by the Ferry Company is its contention that the Port Authority uses too small a portion of the Passenger Fee proceeds to support activities related to ferry operations, and spends most of such proceeds for purposes unrelated to the ferry.

This Court presided over a bench trial and the following are the Court's findings of fact and conclusions of law.

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[1] The two passenger plaintiffs are D & D Wholesale Flowers (substituted as plaintiff for the individual Greg Rose) and Frank Zahradka. A third passenger plaintiff, Robert Heller, was voluntarily dismissed from this action.

[2] The Ferry Company also collects ticket charges from its passengers, but keeps those funds.

II. The Parties' Claims

A. Findings of Fact

The Court finds the following facts with respect to the parties' claims:

1. The Parties

The Ferry Company is a Connecticut corporation with a principal office in Port Jefferson, New York. Since 1883, the Ferry Company has provided a public ferry service for passengers and vehicles traveling between Bridgeport, Connecticut and Port Jefferson, New York.

Plaintiff D & D Wholesale Flowers ("D&D") is a corporation owned by Greg Rose, who was originally named as a plaintiff in this action. Rose has taken the ferry at least twice a week since April 2001 for D&D business purposes. Plaintiff Frank Zahradka is a natural person.[3]

The Port Authority is a quasi-independent agency of the City of Bridgeport, formed in 1993 under Connecticut state law.[4] The Port Authority's affairs are directed by a five-member Board of Commissioners, three of whom are appointed by the Mayor of

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[3] Zahradka withdrew his claim for past damages as he did not testify at trial, but remains a plaintiff for purposes of prospective relief.

[4] The Port Authority was created pursuant to Conn. Gen. Stat. §§ 7-239a to 7-329u, and governed by Chapter 2.28 of the Bridgeport City Code.

Bridgeport, and two serve by virtue of their positions as the City's Director of Economic Development and Harbor Master. Joseph Riccio served as Executive Director from November 1996 until the time of trial. Riccio directs the daily operations of the Port Authority. The Port Authority has two additional employees, Martha Klimas and Charmaine Johnson, who assist Riccio in his daily duties.

The Port Authority's mission is to promote port facilities and economic development of its waterfront areas. The Port Authority's jurisdiction is over the Port District, a geographically defined area which extends approximately 1000 feet inland from the waterways of the Bridgeport Harbor, Black Rock Harbor, Pequonnock River, and Yellow Mill River, excluding property zoned as residential and park land. The Port District also includes other areas not located within 1000 feet of the waterways, including the Remington Woods and the General Electric factory in Bridgeport. The Port Authority owns the Water Street Dock, as well as the Bridgeport Regional Maritime Complex ("BRMC"), which includes the Derecktor Shipyard, the Cilco Shipping Terminal, and the Steel Point Peninsula. The Port Authority's jurisdiction extends to all shipping and terminal facilities within the Bridgeport and Black Rock Harbors, including the Motiva terminal and two other terminals.

2. The Dock and the Ferry Operation

The Ferry Company boats use the Water Street Dock (the "Dock"), and has done so since before 1980. Before the Port Authority was created in 1993, the Ferry Company leased the the Dock and other facilities at the Dock from the City of Bridgeport (the

"City"). The City provided a concrete block building with a small office and public restrooms, a food and beverage cart, and no shelter for passengers. In 1993, when the Port Authority was created, the City of Bridgeport transferred control of the Dock to the Port Authority under a Property Management Agreement. The agreement requires the Port Authority to pay the City fifteen percent of all net operating income related to the operation of the Dock.

The Ferry Company leases the Dock facilities from the Port Authority pursuant to a lease agreement dated December 1, 1998, and amended on July 29, 2002 (the "Current Lease"). The Current Lease expires on November 30, 2011, and may be extended by the Ferry Company for two additional terms of ten years each. Under the Current Lease, the Ferry Company has a "nonexclusive preferential use" of the Dock, and may use the dock facilities and vehicle staging areas for scheduled ferry services. The Ferry Company also has access to "such office space and waiting room space at the Premises as the Port Authority may from time-to-time make available to the Company" and up to four parking spaces for the Ferry Company's employees. The Port Authority reserves for itself all other uses of the Dock. The Ferry Company is also required to purchase and maintain insurance covering the Premises, to indemnify the Port Authority with respect to any claim arising from the activities of the Ferry Company, and to undertake snow removal at the Dock. The Current Lease requires the Ferry Company to pay monthly rent to the Port Authority at annual rates that increase each year, ranging from $100,000 for the initial year to $158,956 for the final year. These rates are at or over the market rental value of the land.

The Ferry Company is responsible for the day-to-day operations at the Dock. Louis Rinaldo, the Dock Manager, and his staff of fifteen to twenty-two dock hands and reservation clerks are responsible for docking and undocking the ferryboats, staging vehicles waiting to board the ferries, directing passengers and vehicles on and off of the ferries, shuttling passengers in vans and golf carts to and from nearby parking lots, snow removal on the Dock, and garbage disposal from the Dock and the Port Authority Office.

The Ferry Company personnel perform security functions in both Bridgeport and Port Jefferson, and are trained in homeland security procedures by the Ferry Company's security officer. These security functions include selectively searching vehicle trunks, vetting trucks, and reporting suspicious activities. The Port Authority provides additional security functions at the Dock on the Bridgeport side; however, if it did not, the Ferry Company would perform all security functions as it does on the Port Jefferson side.[5] The Ferry Company also maintains insurance covering the Dock, as required by the Current Lease.

The Ferry Company's wholly owned subsidiary, Steamboat Concessions, Inc. ("Concessions"), entered into a lease in August 1996 with the Port Authority, under which Concessions operates a restaurant and food services facility in the Ferry Terminal. Under the Lease and Food Services Agreement, Concessions is required to pay the Port Authority $1000 per month base rent, plus additional rent equal to 1% of Concessions' annual gross receipts above $100,000 and

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[5] The City of Bridgeport funds police services and a harbor master.

up to $200,000, plus additional rent of up to $700 per month to defray the Port Authority's costs incurred in cleaning the Terminal premises. Concessions also must pay for its use of electricity, gas, telephone services, as well as for cleaning and maintenance of the area it occupies in the Terminal.

3. The Passenger Fee

Since 1993, the Port Authority has imposed a Passenger Fee (also referred to as a "wharfage fee" or "tariff") on passengers and vehicles embarking on or disembarking from the Ferry Company ferries at the Dock. As mentioned, this fee is in addition to the ticket price for the ferry. The Passenger Fee is collected from passengers by the Ferry Company on behalf of the Port Authority at the time passengers purchase their ferry tickets. The Passenger Fee was fifty cents per passenger and one dollar per vehicle in 1993. In 2003, the rates were two dollars for cars including a driver and one dollar per passenger, and other fees for other categories of passengers. A one dollar surcharge, in addition to the Passenger Fee, was imposed beginning in February of 2006 in order to pay for the Port Authority's fees and costs in this litigation.[6] This Fee is a relatively small portion of the total ferry ticket price to passengers. For example, in 2005, a one-way passenger ticket vehicle with unlimited passengers was $51.25, while the corresponding Passenger Fee was $2.75. The Ferry Company increased its one-way

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[6] Because the Ferry Company refused to collect this surcharge, it is collected directly from passengers embarking or disembarking from the ferry by a firm hired by the Port Authority. An earlier surcharge of 50 cents was the subject of a motion for a preliminary injunction that this Court denied on April 15, 2004.

ticket price for a vehicle with unlimited passengers by $14.25 from 1993 to 2003.

Each month, the Ferry Company remits the amount collected the previous month to the Port Authority, along with a written report of the number of tickets sold and amounts collected in the various categories of passengers and vehicles. The Port Authority pays the Ferry Company a fee for collecting the Passenger Fee. This fee was $22,500 per year until May 2003, when it was increased to $32,500 per year.

4. The Port Authority's Operating Revenues and Expenses

The Port Authority collected a total of approximately $9.5 million in Passenger Fees from 1993 to 2004, and slightly over $1 million in rental revenues from the lease agreements with the Ferry Company and Concessions. The Passenger Fee, together with the rent generated from the lease agreements, constitutes the primary source of operating revenues for the Port Authority. Revenues from the Passenger Fee finance the operation and maintenance of the Dock and Ferry Terminal, as well as operating costs for other Port Authority projects described below.[7] The following table illustrates that the Port Authority's annual revenues from the ferry operation (between the Passenger Fee and the Lease)

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[7] The Port Authority receives minimal income from collecting dockage fees from other Port Users. The Port Authority also receives some income from its lease and management agreement with Derecktor Shipyards; however, as discussed below, this money is remitted to the City and is thus not included in the rental income column in the table.

actually exceed the total operating expenses of the Port Authority. In fact, the total amount of Passenger Fees collected alone from 1993 to 2004 correlates very closely with the Port Authority's total operating expenses during the same period:

Year	Total Passenger Fees Collected by Port Authority(a)	Port Authority's Income from Ferry Company Lease(b)	Port Authority's Credit Card Fees and Passenger Fee Collection Costs (c)	Port Authority's Net Income from Ferry (a + b - c)	Port Authority's Total Operating Expenses for All Activities
1993	$261,342		17,036	244,306	$200,531
1994	449,682	56,666	33,761	472,587	351,597
1995	461,396	82,584	34,590	509,390	442,531
1996	649,015	85,000	41,352	692,663	609,052
1997	678,134	95,000	41,855	731,279	532,735
1998	712,190	97,911	42,514	767,587	671,287
1999	804,287	90,672	46,492	848,467	813,275
2000	901,518	114,167	45,017	970,668	876,643

Year	Total Passenger Fees Collected by Port Authority(a)	Port Authority's Income from Ferry Company Lease(b)	Port Authority's Credit Card Fees and Passenger Fee Collection Costs (c)	Port Authority's Net Income from Ferry (a + b - c)	Port Authority's Total Operating Expenses for All Activities
2001	947,591	110,421	47,399	1,010,613	937,228
2002	984,926	114,507	49,544	1,049,889	1,134,234
2003	1,292,383	118,193	63,909	1,346,667	1,516,650
2004	1,372,031	122,433	71,423	1,423,041	1,773,141
Total	**$9,514,495**	**1,087,554**	**534,892**	**10,067,157**	**9,858,904**

The Port Authority has applied for and received government grants which fund a majority of the capital costs for its development projects, including those at the Dock. These awards totaled almost $30 million dollars as of 2004, much of which has yet to be spent. The grants are only available to government entities, and must be spent according to specific terms.[8]

For example, the Ferry Terminal was built with federal grants and municipal funds, but is maintained by funds from the Passenger Fee. Thus, the Port Authority cannot properly include the grant funds spent on projects, like the Terminal, which benefit the ferry operation, in its accounting of expenses for projects benefitting passengers. Likewise, it does not fund the capital costs for other numerous development projects away from the Dock with its operating revenues. Rather, the Port Authority's resources spent on these projects consist of personnel time, overhead, advertising, and other tangential costs to pursuing the projects, as described below. In other words, the controversy between the parties centers mainly on the Port Authority's allocation of its operating expenses, not capital costs.

Each year, the Port Authority prepares a report setting forth the net revenue earned from the operation of the Dock (the "net revenue report"). The purpose of the net revenue report is to calculate fifteen percent of the net operating income from the Dock that the Port Authority is required to pay to the City each

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[8] The Port Authority's auditors have found that the Port Authority obeyed the grant terms.

year under the 1993 Property Management Agreement with the City. The amount payable under the Property Management Agreement in 1993, the first year of the Port Authority's existence, was calculated by Edward Oppel, then Executive Director of the Port Authority. Oppel prepared the calculation in a manner he believed complied with the Property Management Agreement, allocated some expenses to activities that did not relate to the Dock, and sent a letter to the City presenting his formula, which was meant to reflect the "spirit of the agreement" between the City and the Port Authority. Oppel allocated 50% of the Port Authority's expenses to its activities that did not relate to the Dock, except for the cost of defending an earlier lawsuit by the Ferry Company, which he allocated entirely to the Dock. The amount payable to the City in Oppel's calculation for 1993 coincides with the audited financial statements of the Port Authority that year.

With a few minor exceptions, the Port Authority, in conjunction with their auditor, has continued since 1993 to allocate 50% of the Port Authority's total costs to the Dock.[9] The Port Authority's auditors reviewed the allocations and computed the amounts payable to the City under the Property Management Agreement based on the allocations which were included in the

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[9] The Port Authority made several exceptions to the 50% allocation of expenses to the Dock. A category named "Contributions" was allocated 100% to the Dock from 1994 to 2004, the latest year for which allocations are available. All of the "Legal and Accounting" expenses were allocated to the Dock from 1996 to 2002. Since 2003, 80% of the Legal and Accounting expenses have been allocated to the Dock. Since 1998, "Building Services" and "Security" are allocated 80% to the Dock.

Port Authority's financial statements. The auditors believed the calculations in the net revenues reports were correct and complied with the agreement with the City, and testified that their favorable opinions as to the financial statements of the Port Authority would not have been issued had they known otherwise.

Port Authority witnesses and the auditor, however, testified that the net revenue reports were not true statements of the Port Authority's net income attributable to the Dock and were based on allocations which were artificial computations of the yearly amounts payable to the City to reflect an unspecified agreement between the Port Authority and the City as to how such payments were to be computed. The Port Authority, however, has not provided any evidence of this agreement, and continued to use the allocation method over a course of many years without giving any different instruction to its auditors. Thus, the Court finds that the Port Authority's repeated use of the 50% allocation method over a long period of time, in addition to the periodic adjustments it made to the allocations, is tantamount to an admission on the part of the Port Authority that its expenditures were largely not related to the ferry operation or the Dock.[10] In fact, the expert analyses of the Ferry Company of

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[10] In 2004, the Port Authority's financial statements for the first time contain a footnote stating "The percentage allocation of operating expenses were determined by the City of Bridgeport officials in arriving at the net operating income. These percentages were utilized solely in determining the fees due the City of Bridgeport and are not used for any other purpose." However, this note was only added after the net revenue reports came under scrutiny in this litigation, and it does not effect the Court's conclusion that the percentage allocations are relevant.

the Port Authority's activities indicate that the Port Authority spent considerably less money on the Dock than these reports indicate, not more.[11] For example, the Port Authority allocated a far larger portion of its personnel, advertising, automobile costs, contributions, professional fees, and expenses from other projects to the Dock.

5. Port Authority Services Benefitting Ferry Passengers

The Port Authority engages in several activities that benefit ferry passengers:

A. The Ferry Terminal

The Port Authority built the Ferry Terminal, which was completed in 1996. The new building was a dramatic upgrade from the preexisting structure. The Ferry Terminal consists of two floors: the ground floor, which has a public waiting area, public restrooms, a ferry service information counter, a cafeteria, and a small office for the Ferry Company; and the second floor, which houses the Port Authority and Connecticut World Trade Association offices, a reception area, conference room, and several other offices, and is not open to the public. Construction of the Terminal cost between three and four million dollars and was funded mostly by city, state, and federal grants. This type of funding is only available to government agencies such as the Port Authority, and thus could not have been

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[11] The expert reports are discussed further below.

awarded to the Ferry Company.[12] Maintenance of the Terminal is funded by the Port Authority's operating budget. The Ferry Terminal directly benefits the ferry passengers because it provides them shelter and services while they wait for the ferry boats to arrive.

B. Repair of Bulkhead

In addition, the Port Authority asked the State of Connecticut to repair the bulkhead of the Dock, and the state and federal government subsequently funded the construction. This service benefits the ferry passengers because it ensures the continued viability of the Dock from which the ferry boats embark.

C. The Access Road

The Port Authority initiated the construction of an access road which made the Dock considerably more accessible and safe to passengers. The construction was funded by the State of Connecticut.

D. The Planned Parking Facility

The Port Authority has plans to construct a parking facility in which ferry passengers would be required to park. The Port Authority was able to obtain property that abuts the terminal from an energy company, and

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[12] The federal funding for the Ferry Terminal came from the Ferry Boat Discretionary Fund, which is a federal grant program earmarked for ferry operations. The funds are only available to government or quasi-public agencies, but may only be used for purposes related to ferry operations. In spite of this, the second floor of the Ferry Terminal is used solely by the Port Authority and the Connecticut World Trade Association.

sought and was awarded $3,550,700 from the Ferry Boat Discretionary Fund. Construction has not begun, although the Port Authority has spent over one million dollars in pre-development costs. Since passengers would have to pay in order to park in the garage, the parking facility will generate additional revenue for the Port Authority. At the same time, it will benefit ferry passengers by making parking more convenient than under the current system, in which passengers park in remote lots and must walk or be shuttled to the Dock.

E. Security Measures

The Port Authority applied for and received federal grants of $2.9 million through the United States Department of Homeland Security in order to procure security equipment for the Dock, as well as for the BRMC and the harbor generally. These funds have been used to upgrade the terminal, improve lighting and surveillance, implement key access systems, and for a new port security boat. The Port Authority will also receive an additional $1.4 million with which to purchase equipment to detect improvised explosive devices. These security measures benefit the ferry passengers by ensuring their safety and security once upon the ferry boats.

F. Daily Operations

Finally, the Port Authority performs limited daily operations - mainly the supervision of security and cleaning personnel - relating to the ferry operation and which benefit the ferry passengers.

6. Port Authority's Activities Not Benefitting Ferry Passengers

The Port Authority is also involved in many projects that do not benefit ferry passengers:

A. Steel Point

The Port Authority has pursued development projects on the Steel Point Peninsula, which is a tract of about fifty acres of land located within the Port Authority's jurisdiction but not owned by the Port Authority. The projects include efforts to acquire the property and to promote the construction of casinos, as well as the relocation and management of the Hitchcock Marina. The Port Authority has spent some of its operating funds on Steel Point. For example, in 1993, it paid $10,000 for a design study for Steel Point. In addition, the Port Authority has issued and administered requests for the development of Steel Point, installed a new computer program in connection with these solicitations, and mailed out more than five hundred packages to bidders, and reviewed the proposals. The Port Authority's employees have spent considerable time working on the Steel Point projects, and Steel Point as been discussed at many Port Authority Board meetings.

B. Cartech, the BRMC, and Derecktor Shipyard

The Cartech property is a tract of about forty eight acres of land located within the Port Authority's jurisdiction, and acquired by the Port Authority in 1999 by condemnation. The acquisition process was the subject of numerous Board meetings and personnel

time. When the Cartech property was acquired, it was renamed the BRMC. The Port Authority has been involved with the BRMC's development and has administered multiple requests for development proposals and entered into several contracts for its environmental cleanup and development. These contracts have been made with funds from government grants.[13] Port Authority employees have made trips to the BRMC, done paperwork, obtained insurance, placed ads seeking bids, and arranged for the payment of invoices. The BRMC has been the subject of discussion on Board meetings on multiple occasions. The Port Authority has discussed the development of the BRMC with residents of the east end of Bridgeport, where the BRMC is located, and funded a study regarding such development.

The Port Authority has been involved in the development and leasing of a portion of the BRMC, consisting of about twenty-three acres, to a private shipyard known as Derecktor Shipyards ("Derecktor"). The Port Authority applied for and administered government grants for developing the property for Derecktor, and arranged for environmental remediation of the area. The Port Authority retained and paid for attorneys to advise it in connection with Derecktor. The Port Authority hosted a forum at a hotel to garner support for the Derecktor project, and has arranged and paid for security on the Derecktor site.

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[13] The Port Authority has been awarded approximately $11 million in government grants in connection with the BRMC and Derecktor.

Riccio negotiated and signed a lease on behalf of the Port Authority with Derecktor. The Derecktor lease calls for an initial term of twenty-five years and an option for Derecktor to renew for two consecutive fifteen-year terms, and sets out payment for each of the fifty-five years, which increases from zero for the first three years to $589,486.90 for the last two years. The Derecktor lease also required Derecktor to pay the Port Authority a $15,000 annual management fee, and this fee will increase by 10% every five years. A significant portion of the revenue earned from the Derecktor lease is remitted to the City of Bridgeport in order to repay the amount the City advanced to the Port Authority in order to acquire the Cartech site. The Derecktor Shipyard has been the subject of discussion at multiple Board meetings. The Port Authority has devoted its personnel time and other resources including salary and overhead expenses to activities related to Derecktor.

None of the above-described development benefits ferry passengers nor is it available for their use.

C. High-Speed Ferry to Stamford and New York City

For several years, the Port Authority has pursued a project to establish a high-speed ferry service linking Bridgeport with Stamford, Connecticut, and New York, New York. This high-speed service would be for passengers only, not vehicles. The objective of the high-speed ferry is to alleviate congestion on Interstate 95 and the trains to Stamford and New York by providing an alternative mode of transportation. Port Authority personnel have traveled to New York City, Washington, D.C., San Francisco, California, and

Seattle, Washington to investigate possibilities for this project using Port Authority funds. The Port Authority has retained and paid a lobbyist to promote the high speed ferry service. The Port Authority has issued requests for development proposals, paid for advertisements, applied for government grants and consulted with counsel in connection with this project. The high-speed ferry has been discussed at numerous Board meetings.

The high speed ferry will not benefit passengers on the Bridgeport to Port Jefferson ferry, because the two ferries would have entirely different routes and presumably service different commuters. Indeed, the high speed ferry will not accommodate vehicles, which compromise the majority of the traffic on the Bridgeport to Port Jefferson ferry.

D. Barge-Feeder Service

The Port Authority is currently pursuing the development of an inland distribution network for cargo containers, which would ship containers by barge from the Port of New York and New Jersey to Bridgeport. The purpose of the project is to relieve congestion on Interstate 95. The Port Authority has spent personnel time and monetary resources on the project, including for employee travel. For example, it has issued numerous requests for proposals and reviewed bids, lobbied for the project to be exempt from a federal harbor maintenance tax, and discussed the project at multiple Board meetings. The Port Authority has received about $1.5 million from the State of Connecticut in connection with the feeder services, but the project is not operational and has not

created any revenue for the Port Authority. The barge feeder service does not benefit ferry passengers.

E. Foreign Trade Zone

The Port Authority is involved in the operation of a foreign trade zone in Bridgeport. The foreign trade zone is an area, approximately one hour away from Bridgeport, in which manufacturers and distributors can obtain tariff benefits under federal law. The Port Authority has expended resources in the form of employee time, travel, and legal fees in connection with the trade zone. The foreign trade zone project does not benefit ferry passengers.

F. Cilco and Other Commercial Terminals

The Cilco terminal is a commercial shipping terminal located on land near the BRMC within the Port District, but not owned by the Port Authority. The Cilco terminal is used for overseas cargo, mainly the importation of fruit. The Port Authority has lobbied for government grants relating to the terminal, paid for advertisements, and otherwise promoted the terminal. The Cilco terminal does not benefit ferry passengers.

G. Dredging of Bridgeport Harbor

The Port Authority has obtained federal funds to dredge the Bridgeport harbor. Dredging will increase the depth of the harbor from its current level, twenty-seven to twenty-nine feet, to its maximum depth of thirty-five feet. The ferry boats only require a harbor depth of fifteen feet; however, some of the commercial shipping boats requires a deeper harbor.

The dredging of the harbor will not affect the ferry boats and will thus not benefit the ferry passengers.

H. Pump-out Service

The Port Authority operates a seasonal boat pump-out service, in which it cleans the septic tanks of pleasure boats free of charge. Approximately 75% of the cost of this service is funded by government grants, and the remaining 25% is funded from the Port Authority's operating funds. The pump-out service is not provided to the ferry boats and does not benefit ferry passengers beyond the minimal effect it has on the general cleanliness of the harbor.

I. Other Projects on Port District Land

The Port Authority reviews and votes on any projects affecting land within its jurisdiction in the Port District. This entails a review of the project and a recommendation by the Executive Director, a presentation and submission of documents to the board, discussion at Board meetings, and a vote. This process utilizes personnel time and other resources. The projects that the Port Authority has reviewed include: (1) a methanol plant; (2) expansion of a marina on the Yellow Mill River; (3) construction of a dog kennel; (4) an emission testing facility; (5) a plastics manufacturing plant; (6) a paper recycling plant; (7) an asphalt plant; (8) an automobile and marine service and sales facility; (9) a commercial laundry facility; and (10) purchase and redevelopment of property on the Pequonnock River. None of these projects would benefit ferry passengers.

J. Miscellaneous Activities

The Port Authority has also devoted time and resources to the following activities which are not related to the ferry and do not benefit ferry passengers: (1) retention and payment of attorneys and other professionals to create, select, and register a new trademark for the Port Authority; (2) management of the Hitchcock Marina and the Captain's Cove Marina; (3) a proposal to exercise the Port Authority's condemnation power to acquire land in Bridgeport to be used by Sikorsky Aircraft to expand its helicopter manufacturing facilities; (4) providing free office space to the Connecticut World Trade Association; (5) purchasing season tickets to local minor league baseball and hockey games; (6) obtaining directors' and officers' liability insurance; (7) making charitable contributions; (8) long-distance telephone calls; (9) meals for the Executive Director; (10) employee travel on business unrelated to the ferry; (11) a leased automobile and gas for the Executive Director; and (11) other miscellaneous expenses such as club memberships and Christmas gifts.

7. Damages for Ferry Company

While it is possible that the Ferry Company sustained economic loss as a result of the addition of the amount of the Passenger Fee to its ticket prices, it has not provided any substantial evidence of its damages to the Court. The Ferry Company contends that if there were no Passenger Fee or the amount of the Passenger Fee were less, it would have raised the prices for its tickets and been able to keep the entire amount rather than remitting the Fee to the Port

Authority. However, it has not presented evidence of this proposition except the general testimony of several employees that they would have raised rates, which is too speculative to prove the fact of these damages by a preponderance of the evidence.

In the alternative, the Ferry Company contends that if its rates remained the same, without the Passenger Fee, there would have been greater demand for the ferry service because of the decreased cost, and thus the Ferry Company would have carried more passengers and vehicles and made more profits. It is undisputed that the price elasticity[14] for the ferry service is greater than zero but less than one, indicating on a theoretical level that a change in price at a given point in time would lead to slightly decreased demand. However, the Ferry Company has not presented any credible evidence of any decrease in demand or a corresponding loss in profits. It has not presented any significant modeling or expert opinion as to how this economic principle actually applies to the facts here, especially considering all of the variables that factor into this equation. For example, factors such as the economy, gasoline prices, traffic and weather conditions, the replacement of an older ferry boat with a bigger boat, the addition of a new ferry boat, the new access road, and the improvement in Dock conditions and security, all had an effect on demand for the ferry and ridership since 1993.

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[14] Price elasticity of demand measures the nature and percentage of the relationship between changes in quantity demanded of a good and changes in its price (% change in demand/% change in price). A price elasticity of less than 1.0 is considered relatively inelastic.

Indeed, the Ferry Company has not presented any evidence that it lost ridership because of the Passenger Fee. Ferry ridership has risen steadily since 1993.[15] In addition, the ferry operation has been highly profitable since the creation of the Port Authority. Its operating revenues increased from $9,774,666 in 1992 to $26,801,121 in 2005, and its profits increased from $659,375 in 1992 to $2,395,832 in 2005.[16] The following chart presents those increases through 2003:

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[15] This increase in ridership is partly attributable to both the Ferry Company's addition of another ferry boat, and the Port Authority's construction - through government grants - of improved and safer facilities at the Dock.

[16] While the increase in profitability does not mean that the Ferry Company *could not have* shown that it would have been more profitable without the Passenger Fee, the Court has found the Ferry Company has not presented sufficient evidence of this effect.

Year	Operating Revenues	Net Income	Rate of Profitability
1992	$9,744,666	$659,375	6.7%
1993	10,511,787	1,027,695	9.7
1994	11,385,376	1,641,585	14.4
1995	11,784,365	1,838,248	15.6
1996	13,144,918	1,616,755	12.3
1997	13,627,372	2,157,375	15.8
1998	14,667,617	2,334,208	15.9
1999	16,867,142	2,389,810	14.2
2000	20,173,217	2,130,524	10.6
2001	22,419,228	3,533,667	15.8
2002	23,595,012	4,104,452	17.4
2003	24,109,912	6,730,220[17]	27.9

[17] The Ferry Company's income was inflated in 2003 because of the sale of an asset.

Furthermore, the Ferry Company has not presented any evidence that it was unable to further increase its ticket prices, and indeed did increase the ticket prices on a near annual basis since the Port Authority's creation. For example, from 1997 to 2003, the price of a one-way passenger ticket for a vehicle with unlimited passengers increased by $14.25. In contrast, the Passenger Fee has been raised only twice. For example, from 1997 to 2003, the Fee was raised from $2.50 to $2.75, an increase of only twenty-five cents. The increase in the ticket price was thus fifty-seven times greater than the corresponding increase in the Passenger Fee over the same seven-year period. The Ferry Company conceded that the Passenger Fee does not affect its decisions to adjust ticket rates, and the general manager of the Ferry Company stated that he would have set the same rates without the additional Passenger Fee.

Finally, the Ferry Company considers the rates charged by a competitor, the Cross Sound Ferry between New London, Connecticut and Orient Point, New York on Long Island, as one factor when it sets its rates. However, it has not shown any evidence that passengers choose one ferry over the other based on a de minimus difference in its rates.

8. Damages for Individual Plaintiffs

Greg Rose, an employee of Plaintiff D&D, rode the ferry twice a week for at least five years preceding the trial date, or since April 2001. During this time, D&D paid the full ticket price including the Passenger Fee. Thus, D&D was damaged to the extent that this fee was excessive under the Commerce Clause during those years. To determine excessiveness for purposes

of the individual damages only, the Court relies on the expert testimony presented below.

The plaintiffs' expert forensic accountant, Alan Schachter, created three different models in order to, in the plaintiffs' words, determine "the amounts, if any, by which the Passenger Fees received by the Port Authority have exceeded the reasonable cost of the facilities and services that the Port Authority has actually provided to the ferry operation."[18] In the first model, Schachter simply adopted the figures used by the Port Authority in its own net income reports, discussed above, and calculated an "overcharge" of $2,732,200 from 1993 to 2003. Schachter concluded that the Port Authority's own figures represented a "floor" for the total overcharge because his review of its financial records suggested the figures in many categories were not accurate and overstated the allocations to the Dock and thus the ferry.

In the second model, Schachter used the Port Authority's calculations as a base, and then adjusted the allocations for those categories for which he had sufficient information to determine that the allocation used by the Port Authority was inappropriate. For example, he reduced the allocations for personnel costs, advertising and marketing, automobile expenses, contributions, and professional fees based on his review of the available documents. The overcharge

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[18] In undertaking his analysis, Schachter reviewed the records kept by the Port Authority's auditor, the minutes of the Port Authority's board meetings, the Port Authority's available general ledgers, the Port Authority's available telephone and credit card bills, copies of the Port Authority's advertising materials, and the relevant deposition transcripts.

under the second model, from 1993 to 2003, was $4,360,700. However, Schachter was unsatisfied with this model because he did not wish to be fettered by the Port Authority's accounting and the "layer of bureaucratic authority" between the ferry operation and the Port Authority.

Finally, in the third model, Schachter made his own calculation of the overcharge by comparing the proceeds of the Passenger Fee each year with the reasonable cost to the Port Authority of what it actually provided to the ferry operation that year. Because the Ferry Company already provides some of the services and facilities at the Dock, such as dock hands, office and telephone expenses, insurance, snow removal, and some security, Schachter eliminated duplication by discounting the Port Authority's allocations to these same expense categories. If there was a documentary basis for the Port Authority's allocation, Schachter accepted it. Under the third model, the overcharge from 1993 to 2003 was $6,728,300.

The Court acknowledges that none of these models represents a completely accurate application of the correct legal standard for user fees, discussed below, to the Port Authority's use of the Passenger Fee revenues. However, the standard that Schachter relied on is reasonably close to the constitutional standard such that the Court will rely on it solely for purposes of computing the amount by which D&D overpaid the Port Authority in the five years preceding the trial. For this purpose, the Court credits the second model, because it starts from the Port Authority's own accounting system and records and adjusts it based on the available evidence, reflecting an approximation of

which of the Port Authority's actual expenditures do or do not benefit the ferry passengers.[19]

Under the second model, in 2001, the overcharge was 49% of the Passenger Fee revenue, and in 2002, the overcharge was 46% of Passenger Fee revenue.[20] In those years, D&D paid a Passenger Fee of $1.50 (for a vehicle and driver) on each ferry ride. In 2003, the overcharge was 57% of Passenger Fee revenue, and D&D paid a $2.00 Passenger Fee for each ferry ride. After February 1, 2006, when the $1.00 surcharge was implemented, D&D paid a $3.00 Passenger Fee per ticket. Using these percentages, applying the 2003 percentage to the ensuing periods up until April 19, 2006,[21] when Greg Rose testified, and assuming two ferry trips per week, D&D incurred total damages of $494.63, computed as follows:

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[19] Because the first model is based solely on the Port Authority's inaccurate reports, it is less accurate than the second model.

The third model represents how Port Authority and the Ferry Company would allocate the expenses of operating the ferry and Dock most efficiently, but does not reflect actual practice. While it might be preferable and more efficient for the Port Authority not to duplicate expenditures already paid for by the Ferry Company, such as insurance at the Dock, this decision seems to the Court to be within the discretion of the Port Authority as a government agency.

[20] These figures were computed by comparing the total amount of Passenger Fee revenue in a given year and the total amount of the overcharge in that year.

[21] The 2003 percentage was the latest available when Schachter prepared his report.

Period	Number of Trips (a)	Passenger Fee per Trip (b)	Total Passenger Fee Paid (c) = (a) x (b)	% Passenger Fee Was Excessive (d)	Excess Amount Paid (D&D's Damage) (e) = (c)x(d)
Apr. 2001 - Dec. 2001	75	$1.50	$112.50	49	$55.13
2002	100	1.50	150.00	46	69.00
Jan. 2003 - Jan 2006	308	2.00	616.00	57	351.12
Feb 2006 to March 2006	17	2.00	34.00	57	19.38
TOTALS	500		$912.50		$494.63

III. Conclusions of Law

The plaintiffs brought claims for damages or injunctive relief under seven different legal theories. The following are the Court's conclusions of law:

A. Claims under the Commerce Clause and Right to Travel

The Commerce Clause provides: "The Congress shall have Power. . .[t]o regulate Commerce. . .among the several states." U.S. Const. Art. 1, § 8. Although the Constitution's text does not explicitly limit the power of states to regulate commerce, the United States Supreme Court has long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority, 127 S.Ct. 1786, 1793 (2007) (citing cases). The Commerce Clause thus prevents states from passing laws or engaging in activities that discriminate against interstate commerce. See West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994).

In Evansville-Vanderburgh Airport Authority District. v. Delta Airlines, Inc., the United States Supreme Court ruled that the Commerce Clause did not prohibit states or municipalities from charging commercial airlines $1 per passenger at airports within their jurisdiction in order to defray costs related to airport facilities. 405 U.S. 707, 716-17 (1972). "[A] facility provided at public expense aids rather than hinders the right to travel. A permissible charge to help defray the cost of the facility is therefore not a burden in the constitutional sense."

Evansville, 405 U.S. at 714. The Court established a three-part test for determining whether a user fee imposed by a government transportation authority is valid under the Commerce Clause and adequately protects the right to travel.[22] A user fee comports with both constitutional clauses if (1) it does not discriminate against interstate commerce; (2) it is based on a fair approximation of use or privilege for use of the facilities for whose benefit they are imposed; and (3) it is not excessive in comparison with the government benefit conferred or in relation to the costs incurred by the charging authority.[23] Id. at 716-17. An application of this test to the Passenger Fee follows.

1. Discrimination Against Interstate Commerce

It is clear the Passenger Fee does not discriminate against interstate commerce or travel, as it does not distinguish among citizens of different states or between intrastate and interstate travel. See id. at 717.

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[22] The constitutional right to travel from one state to another. . .occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." United States v. Guest, 383 U.S. 745, 757 (1966). The Ferry Company brought a separate claim for a violation of its right to travel; however, the parties agree the standard is the same as for the Commerce Clause and both will be addressed in this section.

[23] The Evansville test has also been referred to by courts as the "Massachusetts test" because it was relied on by the Supreme Court in Massachusetts v. United States, 435 U.S. 444 (1978). Jorling v. United States Dept. of Energy, 850 F. Supp. 132, 142 n.8 (N.D.N.Y. 1994).

2. Fair Approximation of Use

The Court finds that the second requirement of Evansville, that the user fee must be based on a fair approximation of use or privilege for use of the facilities for whose benefit they are imposed, is not met by the Port Authority's Passenger Fee. In its application of the fair approximation prong in Evansville, the Supreme Court concluded that the charges on emplaning passengers "reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed;" id. at 717; despite exemptions for certain classes of passengers and aircraft and for non-passenger users of airport facilities, because "distinctions based on aircraft weight or commercial versus private use do not render these charges wholly irrational as a measure of the relative use of the facilities for whose benefit they are levied." Id. at 719.

The Passenger Fee is charged to all passengers embarking or disembarking in Bridgeport, and its amount varies according to the passenger's age and whether the passenger has a vehicle. Other Port users, such as those dropping off passengers at the Dock, or eating in the Terminal, are not charged any fees by the Port Authority. Thus, the Port Authority argues that the Passenger Fee is based on a fair approximation of use of the Port facilities since it is permissible to draw rational distinctions among different classes of Port users, and the ferry passengers are an administratively easier group to charge than users of other Port facilities.

However, even if the Port Authority may charge ferry passengers rather than other Port users, it still

cannot charge a fee that is not based on a fair approximation of the ferry passengers' general or at least potential use of the facilities for which the fee is imposed.[24] In Northwest Airlines, Inc. v. County of Kent, the United States Supreme Court found that an airport's decision to allocate costs according to a formula which charged the airlines only their allocated share of the airfield and terminal costs, and which did not allocate a portion of aircraft costs to airport concessionaires reflected a "fair, if imperfect, approximation" of the use of facilities for whose benefit they are imposed" because only the airlines and general aviation actually use the runways and navigational facilities. 510 U.S. 355, 369 (1994); see also Massachusetts v. United States, 435 U.S. 444, 467-49 (1978) (federal tax on noncommercial aircraft flying in navigable airspace of United States based on gallons of fuel used, pounds per aircraft tire, pounds per tube, and annual aircraft registration fee is fair approximation of costs of benefits each aircraft receives from navigational assistance and other special services supplied by United States).

One district court elaborated on the fair approximation requirement:

> [The fair approximation prong] of the . . . test does not require an exact correlation, in terms of dollars and cents, between the costs of the overall services provided and the fees assessed

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[24] There is no dispute as to whether the different charges for different categories of passengers is a fair approximation of use. Rather, the dispute here centers on whether it is fair to charge the ferry passengers for the use of the entire Port District.

> for such services. Nor does it require that a governmental entity adopt a formula that results in a 1:1 relationship between the actual use of the services by a particular entity and the cost of providing those services to that entity. Rather, it requires only a rational relationship between the method used to calculate the fees and the benefits available to those who pay them.

Jorling v. United States Dept. of Energy, 850 F. Supp. 132, 142-43 (N.D.N.Y. 1994), aff'd, 218 F.3d 96 (2d Cir. 2000).

The Court finds there is no such rational relationship between the method used to calculate the Passenger Fee and the benefits available to the Passenger Fee-payers. The Passenger Fee appears to be calculated according to a method which ensures the Passenger Fee revenues will cover all of the Port Authority's operating costs and development projects throughout the Port District, as almost all of the Port Authority's revenues and all of their operational funding come from the Passenger Fee. The Port Authority has not presented sufficient evidence that it calculates the fee based on any method meant to even roughly approximate the ferry passengers' use of the Port District.

The ferry passengers may use only the access road, the Ferry Terminal, and the Dock when they visit the Port District. The Passenger Fee is thus imposed for the benefit of all of the facilities in the Port District, but the ferry passengers only use one specific area of the Port District, and the passengers are being charged for the privilege of using the entire Port

District, when in fact they may only use a small portion of the District.

The Port Authority correctly notes that in calculating the fee, it may consider more than the cost of the services actually used by each person, but also the services available for use. Jorling v. United States Dept of Energy, 218 F.3d 96, 103 (2d Cir. 2000) (hereinafter "Jorling II."). However, many of the other Port District activities funded by the fee are not even available to the ferry passengers (such as Derecktor, BRMC, harbor dredging, the barge feeder service, and the foreign trade zone). Nor are the development projects or activities away from the Dock intended to facilitate travel on the ferry or travel by passengers in and out of the Port District generally. Rather, they are intended to develop completely separate areas of the Port. This differs from the airport in Evansville, because while each emplaning passenger did not necessarily use all of the different airport facilities, the vast majority of them were available for the passengers' use or intended to facilitate air travel in general. The ferry passengers should not be charged for the use of the entire Port District, because the other Port Authority activities are not available to them and do not benefit them.[25] 510 U.S. at 369.

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[25] As the Second Circuit noted in Jorling II, cases applying the "fair approximation" requirement test in the Commerce Clause context reflect some disagreement as to whether the focus is on use or cost. The Jorling II court concluded that:

> Ultimately, of course, the Massachusetts test is concerned with whether the challenged method for imposing charges fairly apportions the cost of providing a service, but by framing the second component of the test in terms of

Thus, the Passenger Fee is not based on a fair approximation of the use or privilege for use of the facilities for whose benefit they are imposed.

3. Excessiveness

Finally, the Court finds that plaintiffs have shown that the Passenger Fee is excessive in comparison with the government benefit conferred and in relation to the costs incurred by the taxing authority.[26] In Evansville,

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> "use," the Court made clear that a method for imposing charges based on each payer's approximate use will pass muster as an adequate apportionment of costs. The alternative. . .is to engage in a detailed cost accounting analysis that endeavors to determine the cost, properly allocated to each payer, of every person, product, and facility involved in providing the service. The Court evidently was satisfied that a fair approximation of the use of the service adequately serves as a surrogate for an otherwise complicated and expensive attempt to allocate costs.

218 F.3d at 103. Here, the Passenger Fee is not a fair approximation of either the cost of the facilities provided to the ferry passengers, which is largely covered by the Lease and government grants, nor of the use of ferry passengers of the available facilities.

The Port Authority also contends that the value of the services it provides to the ferry passengers should be considered, rather than the cost. The Second Circuit, however, made clear in Jorling II that the concern is regarding use and cost. Cf. United States Shoe Corp. V. United States, 114 F.3d 1564, 1574 (Fed. Cir. 1997) ("cost of benefits, rather than the value, is the appropriate measure" in evaluating constitutionality of user fees under Export Clause).

[26] The Evansville court used the "government benefit conferred" language in announcing the standard, and the "costs incurred by

the Supreme Court found that the airlines did not show the fees were excessive in relation to the costs incurred by the taxing authority, where the total fees collected were less than the total costs incurred on airport facilities. 405 U.S. at 720. Subsequently, in Northwest Airlines, the Supreme Court found that, in light of the fact that the airport charged the airlines the "break-even costs for the areas they use," it could not conclude that the airlines charged fees excessive in comparison with the government benefit conferred.[27] 510 U.S. at 370; citing Brief for United States as Amicus Curiae ("As long as an airport's charges to air carriers do not result in revenues that exceed by more than a reasonable margin the costs of servicing those carriers. . .[the] charges [are] reasonable under federal law."). See Massachusetts, 435 U.S. at 422 (tax not excessive in relation to cost of government benefits supplied when "revenues from user fees fell far short of covering the annual civil aviation outlays"); Alamo Rent-A-Car v. Sarasota-Manatee Airport Auth., 906 F.3d 516, 522 (11th Cir 1990) (user fee on rental car agency receipts not excessive when total amount collected constituted less than 5% of airport authority's annual operating expenses).

It is undisputed that the Passenger Fee covers all of the Port Authority's operating expenses and is

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the taxing authority" language in applying the standard. Courts applying the standard use the concepts interchangeably.

[27] In fact the District Court in Northwest Airlines found that the airport overcharged the airlines for aircraft parking and ordered the airport "to recalculate this fee to result in a true break-even charge." 510 U.S. at 370 n.16, quoting 738 F. Supp. 1112, 1115 (W. Mich. 1990).

almost the sole source of revenue for the Port Authority.[28] The Port Authority urges the Court to find that all of its activities at least indirectly benefit the ferry passengers because they benefit the general public by developing the Port District, and thus the fees charged are not excessive in relation to the government benefit conferred on the payers. In making this argument, the Port Authority analogizes the Port District to the Airport in Evansville, as the revelant facility by which to measure costs and benefits.

The Court finds the Port Authority's argument unconvincing. First, the Port District differs significantly from the airport in Evansville: the vast majority of airport development is intended to benefit the passengers traveling on airplanes leaving the airport, or to facilitate their air travel; the Port District, however, includes many projects beyond the Dock that are not functionally related to the ferry operation, and are not intended to benefit the travelers on ferries, or to facilitate their boat travel from Connecticut to Long Island. Cf. Auto. Club of New York v. Port Auth. of New York and New Jersey., 887 F.2d 417, 422-23 (2d Cir. 1989) (Port Authority could include toll revenue from tunnels and bridges to fund commuter train, when the bridges, tunnels, train, and bus facilities were sufficiently functionally related because all facilities contributed to Port Authority's performance of duty to provide transportation to

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[28] The Port Authority's lease with Derecktor generates some income; however, these funds are remitted to the City in order to repay them for the costs of obtaining the land. The Port Authority also covers some expenses by collecting rent from the Ferry Company.

travelers over and under waterways between southern New York and northern New Jersey).

In addition, the benefits to the ferry passengers as members of the general public are too attenuated to serve as the basis for the Passenger Fee. None of the cases cited by the parties suggests that a government benefit conferred on fee payers in their capacities as members of the general public, rather than of users of the government facilities, is sufficient to satisfy the Evansille test. See Northwest Airlines, 510 U.S. at 864-65 (government benefit to airlines as users of airport); Massachusetts, 435 U.S. at 469 (government benefits to civil aircraft as users of government provided civil aviation facilities); Evansville, 405 U.S. at 720 (government benefit was use of airport facilities); Alamo Rent-A-Car., 906 F.3d at 521 (off-site rental car agency received government benefit of improved airport facilities, including roads upon which its vans travel). Rather, the language in the relevant case law, cited throughout this opinion, implies that user fees are sustainable in exchange for a benefit or service rendered to the payers.

The Port Authority, mainly through government grants, financed the construction of an access road, new terminal, and repairs to the Dock, all of which benefit the Passenger Fee payers. However, the costs to the Port Authority of the facilities used by, or that benefit, the ferry passengers are far less than the total

amount it collects from the Fee.[29] Thus, the benefits conferred by the Port Authority on the passengers are not even roughly proportional to the fees paid.

Thus, it cannot be said that the Port Authority charges the ferry passengers "the break-even costs for the areas they use," and the Court finds that the Port Authority's charges result in revenues that exceed the costs of services to the ferry passengers by an

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[29] The Port Authority correctly argues that it may offset a surplus in revenues over outlays in any one year against actual deficits of past years, and perhaps projected deficits of future years. Evansville, 405 U.S. at 719-20, cited in Massachusetts, 435 U.S. at 470 n.24. However, the Court finds this principle inapplicable here, because it assumes the use of revenues from the Fee for expenditures by the Port Authority on or at least related to the ferry operation. Rather, the Port Authority spends all of the Passenger Fee revenues each year on all of its projects, regardless of whether they benefit the ferry passengers. In addition, the record does not reflect any Port Authority deficits from past years, or any intention by the Port Authority to save excess fees collected for future projects to benefit ferry users.

unreasonable margin and thus are excessive.[30] See Northwest, 510 U.S. at 370.

Therefore, the Court finds that the Port Authority's imposition of the Passenger Fee violates the Commerce Clause. The Court recognizes that the great majority of the courts that have previously considered similar user fees have reached the opposite conclusion and given the government authorities wide discretion to spend user fees. In this case, however, the vast majority of the Port Authority's revenues come from the Passenger Fee, and so little of the Port Authority's expenses, time, efforts, and resources go toward any benefits even available to the ferry passengers, that it

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[30] The Ferry Company contends that the fact that most of the revenue generated by the Passenger Fee goes to projects that are not used by the ferry passengers also renders the Fee excessive. In Evansville, the Supreme Court rejected the similar argument that charges were not based on use because half of the revenues generated were allocated to unrestricted general revenue. See Evansville, 405 U.S. at 720. "[S]o long as the funds received by local authorities under the statute are not shown to exceed their airport costs, it is immaterial whether those funds are expressly earmarked for airport use." Id; see also Jorling II, 218 F.3d at 105 (New York does not violate the Massachusetts test by earmarking half of the hazardous waste fees for its superfund and using general revenues to pay for portions of the services available to hazardous waste producers); Center for Auto Safety, Inc. v. Athey, 37 F.3d 139, 144 (4th Cir. 1994) (immaterial that Maryland does not keep charity registration fees in separate fund but turns them over to state treasury). However, the plaintiffs showed that the funds received from the Passenger Fee do indeed far exceed the Dock costs. In addition, in the cases cited above, the funds for the services provided to the fee payers simply came from another revenue source, not exclusively from the fees paid, whereas here, the Passenger Fee is the only significant revenue source of the Port Authority.

simply cannot be said that the Fee fairly approximates passenger use of the Port, or that it is not excessive in relation to the government benefit conferred. In short, the Evansville test would be completely eviscerated if this activity was considered to be within its bounds.

B. Tonnage Clause

The Tonnage Clause provides "[N]o State shall. . .lay any Duty of Tonnage." U.S. Const., Art 1, § 10, cl. 3.[31] In Clyde Mallory Lines v. Alabama, the United States Supreme Court explained the reach of the Tonnage Clause:

> [T]he prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even

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[31] The Clyde Mallory Court explained the history and purpose of the Tonnage Clause:

> It seems clear that the prohibition against the imposition of any duty of tonnage was due to the desire of the Framers to supplement Art. I, § 10, Clause 2, denying to the states power to lay duties on imports or exports . . . by forbidding a corresponding tax on the privilege of access by vessels to the ports of a state, and to their doubts whether the commerce clause would accomplish that purpose. If the states had been left free to tax the privilege of access by vessels to their harbors the prohibition against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise. At the time of the adoption of the Constitution "tonnage" was a well understood commercial term signifying in America the internal cubic capacity of a vessel.

296 U.S. at 264-65.

> though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port. But it does not extend to charges made by state authority, even though graduated according to tonnage, for services rendered to and enjoyed by the vessel, such as pilotage, or wharfage, or charges for the use of locks on a navigable river.

296 U.S. 261, 265-66 (1935) (internal citations omitted). The Clyde Mallory Court upheld a harbor fee imposed on all ships entering the Port of Mobile because the fee was a reasonable charge for a police and fire service provided to the vessels entering the harbor. Id. at 266-67. The Court reasoned that the general safety services "inure to all who enter [the harbor]" even if a particular vessel is not given any special assistance. Id.; see also New Orleans Steamship Assoc. Plaquemines Port, Harbor, & Terminal Dist., 874 F.2d 1018, 1023 (5th Cir. 1989) (tonnage clause prohibits reliance on tonnage duties to raise general revenues, and thus permits fee for available emergency services); Plaquemines Port Harbor & Terminal Dist. v. Fed. Mar. Comm'n, 838 F.2d 536, 545 (D.C. Cir. 1988) (reasonable fee to support emergency services rendered by Port inured to all who used Port because all vessels, whether or not they need rescue services, benefit from their availability); Hawaiian Navigable Waters Pres. Soc'y v. State of Hawaii, 823 F. Supp. 766, 776 (D. Haw. 1993) (reasonable mooring and anchoring fees charged for use of restroom facilities, parking, trash disposal, and security services rendered were not impermissible duty of tonnage).

The Passenger Fee imposed by the Port Authority is used for the impermissible purpose of raising general revenues and for projects which do not and could not benefit the ferry passengers. It is not used for emergency or other services available to, but not necessarily used by, all vessels and persons using the harbor. Instead, a significant portion of the Passenger Fee funds projects completely unrelated and unavailable to the fee payers, such as negotiations, legal fees, and development proposals for the BRMC, Derecktor, the foreign trade zone, the barge feeder service, harbor dredging, and the high-speed ferry.[32] Thus, the difference between the amount of the fee and the benefits received by the ferry passengers is vast, and creates more than a "slight divergence between the class that benefits and the class that pays." Plaquemines; 838 F.3d at 545 n.8. Thus, it is not a reasonable fee for general services rendered, but rather is an impermissible duty of tonnage.

C. The Rivers and Harbors Appropriation Act

The Port Authority contends that the Maritime Transportation Security Act of 2002, which added new subsection (b) to the Rivers and Harbors Appropriation Act of 1884, 33 U.S.C. § 5(b), codified the existing Commerce Clause jurisprudence with respect to user fees. The relevant provision reads:

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[32] The Port Authority suggests that the Fee is used for services such as the construction of the Ferry Terminal, access road, and the parking garage, when these projects were actually funded by government grants. Def.'s Proposed Findings at 71. While the costs of the Port Authority's efforts to obtain these grants are properly funded by the Passenger Fee, it is simply not accurate to state that the Fee funded these projects.

> (b) No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for. . .(2) reasonable fees charged on a fair and equitable basis that (A) are used solely to pay the cost of a service to the vessel or water craft; (B) enhance the safety and efficiency of interstate and foreign commerce; and (C) do not impose more than a small burden on interstate or foreign commerce.

33 U.S.C. § 5(b). There is no case law applying this provision. The language of the requirements closely tracks the Commerce Clause and Tonnage Clause cases discussed above in its focus on reasonable fees used to cover the cost of service to vessels, and the parties agree the provision was intended to clarify, not change, the Commerce Clause jurisprudence concerning legal fees. It is not clear to the Court whether the RHAA applies to the ferry passengers, or whether there is a private right of action under the statute, and the parties have not addressed these questions. However, since the Court has found violations of the Constitution and any relief under this act would be duplicative, it need not reach these issues.

D. Unjust Enrichment under Connecticut Law

"Unjust enrichment applies whenever justice requires compensation to be given for property or services rendered under a contract, and no remedy is available by an action on the contract.... Indeed, lack of a remedy under the contract is a precondition for recovery based upon unjust enrichment." Gagne v. Vaccaro, 766 A.2d 416, 424 (Conn. 2001) (internal quotation marks omitted) (citing 12 S. Williston, Contracts (3d Ed.1970) § 1479, p. 272). Plaintiffs seeking recovery for unjust enrichment must prove '(1) that the defendants were benefited [sic], (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment. Hartford Whalers Hockey Club v. Uniroyal Goodrich Tire Co., 231 Conn. 276, 283 (1994); see also 12 Williston, Contracts § 1479, p. 276 (3d ed. 1978).

The plaintiffs claim that the evidence has established all three required elements. First, they claim that the Port Authority has received benefits in the form of monetary proceeds from the Passenger Fee. Next, the plaintiffs argue that the Port Authority has unjustly not paid the plaintiffs for the benefits because the cost to the Port Authority of the facilities and services it has provided to the ferry operation has been substantially less than the proceeds it has received from the Passenger Fee. Finally, the plaintiffs argue that the Port Authority's failure to provide consideration for the full amount of the Passenger Fee has been detrimental to the plaintiffs because it has caused passengers to pay an unnecessarily high fee in relation to the cost of the facilities and services they

have received from the Port Authority, which has resulted in monetary damages to the Ferry Company and the passenger Plaintiffs.

As noted above, the Court finds that the Ferry Company has not proved any monetary damages, so the unjust enrichment claim fails as to the Ferry Company.[33] As for the ferry passenger plaintiff, since the Passenger Fee only unjustly benefitted the Port Authority to the degree that it violated the Constitution, any potential relief under the unjust enrichment theory would necessarily only duplicate the compensatory damages he will receive under the Constitution. Thus, the Court will not reach the merits of this claim as to the passengers.

E. Conn. Gen. Stat. §§ 7-329a to 7-329u

The plaintiffs claim that the Port Authority has exceeded the authority to collect fees granted to it pursuant to Conn. Gen. Stat. §§ 7-329a to 7-329u, under which the Port Authority was created. Section 7-329c(10) gives the Port Authority the power to

> Fix fees, rates, rentals or other charges for the purpose of all port facilities owned by the port

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[33] In addition, the plaintiffs argue the Port Authority has been unjustly enriched because it has charged the Ferry Company twice for the same services, namely the use of the Dock, because under the Lease, the Ferry Company is required to maintain the Dock area, yet the Port Authority attempts to justify the amount of the Passenger Fee by the cost of providing the same maintenance service. However, since the Ferry Company did not itself pay the Passenger Fee, the Court finds this claim to be without merit.

> authority and collect such fees, rates, rentals and other charges for such facilities owned by the port authority, which fees, rates, rentals or other charges shall at times be sufficient to comply fully with all covenants or agreements with the holders of any bonds issued under the provisions of sections 7-329a to 7-329f, inclusive.

In addition, section 7-329i authorizes the Port Authority to "fix, revise, charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by each project." "Project" means the acquisition, purchase, construction, reconstruction, improvement or extension of a port facility;. § 7-329b(2). "Port facilities" are defined quite broadly as:

> (A) wharves, docks, piers, vessels, air or bus terminals, railroad tracks or terminals, cold storage and refrigerating plants, warehouses, elevators, freight-handling machinery and such equipment as is used in the handling of freight, passengers and vessels, vehicles, and the establishment and operation of a port and any other works, vessels, vehicles, rolling stock, properties, buildings, structures or other facilities necessary or desirable for commerce and industry or waterfront development within a district or in connection with the development and operation of port facilities, or (B) manufacturing and industrial facilities, recreational and entertainment facilities, residential facilities or other commercial facilities necessary for commerce and industry

> or waterfront development within a district, and (C) located within or benefiting the district.

§ 7-329b(4). Such charges may be imposed for the purpose of funding (1) the cost of maintaining and operating the project; (2) payments of principal and interest on any bonds issued in respect of such project; and (3) any reserves required to secure such bonds.

Because a substantial portion of the Passenger Fees imposed by the Port Authority is not used to fund the cost of a particular project, but to fund general Port Authority activities, the plaintiffs contend the Port Authority has exceeded its power under the Enabling Statute.

It is not clear to the Court that there is a private right of action under the statute. However, since the Court has found violations of the Constitution and any relief under this act would be duplicative, it need not reach this issue.

F. Connecticut Unfair Trade Practices Act ("CUTPA")

The Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a et seq., provides that "[n]o person shall engage in unfair or deceptive acts or practices in the conduct of any trade or commerce." § 42-110b(a). To determine whether a practice is an unfair trade practice under CUTPA, a Court weighs:

> (1) [[W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -

> whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers [(competitors or other businessmen)].

Fabri v. United Technologies Intern., Inc., 387 F.3d 109, 120 (2d Cir. 2004); quoting Cheshire Mortgage Serv. Inc. v. Montes, 612 A.2d 1130, 1143 (Conn. 1992). "A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.... Thus a violation of CUTPA may be established by showing either an actual deceptive practice ... or a practice amounting to a violation of public policy.... Furthermore, a party need not prove an intent to deceive to prevail under CUTPA.." Cheshire, 612 A.2d at 1143-44 (citations and internal quotation marks omitted).

The Court finds that the plaintiffs have not shown that the Port Authority's imposition of an excessive passenger fee is an unfair trade practice by the preponderance of the evidence. The fee does violate the Commerce Clause, so arguably it is contrary to public policy as established by the Constitution. However, the imposition of a user fee on ferry passengers is not in itself unconstitutional, but only becomes so because the Port Authority has used the revenues for overly broad purposes. Thus, the degree to which public policy is offended is slight. The imposition of the Passenger Fee cannot be said to be "immoral, unscrupulous, or oppressive." Finally, and importantly, the Passenger Fee has not caused substantial injury to consumers, competitors or businessmen. Indeed, the

Ferry Company has failed to prove it has sustained monetary damages. The monetary damages to the passenger plaintiff likewise have been minimal. Thus, the Court finds the plaintiffs have not provided sufficient evidence to support their CUTPA claim.

G. Damages

The Ferry Company correctly cites the principle that if a reasonable probability of damages has been established, damages need not be calculated with mathematical precision, but rather may be approximated if there is a reasonable basis of computation. See, e.g. Storey Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931); Hydro Investors, Inc. Trafalgar Power Inc., 227 F.3d 8, 19 (2d Cir. 2000). Based on this principle, the Ferry Company urges the Court to award it $9,038,500, which is the amount of the overcharge calculated by their expert in his third model, described above, plus interest. However, as discussed above, the Ferry Company has not proved by the preponderance of the evidence the fact that it has sustained damage or any economic losses as a result of the constitutionally excessive Passenger Fee.[34] Thus, the

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[34] The Ferry Company argues that this Court's ruling denying the Port Authority's motion to dismiss, which found that the Ferry Company had standing to pursue this claim, provides support for its claim that it has in fact been damaged, even if it could not prove the amount. See Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Auth., 335 F. Supp. 2d 275, 283 (D. Conn. 2004). However, the Court's ruling that the Ferry Company had standing only indicated that the Ferry Company alleged sufficient injury to pursue its claim in this Court, not that the Ferry Company had proved the fact of their damages for trial purposes.

Court declines to award the damages suggested by the Ferry Company.

However, "[i]f the wrong complained of is a mere technical violation of the plaintiff's constitutional rights and she is unable to prove actual damage, she would nevertheless be entitled to a recovery of nominal damages." Davis v. Village Park II Realty Co., 578 F.2d 46, 463 (2d Cir. 1978). The right to engage in interstate commerce free of discriminatory taxes or fees has been recognized as an individual constitutional right.[35] Dennis v. Higgins, 498 U.S. 439, 449 (1991). The Passenger Fee is unconstitutional, and as the collector of the Fee, the unconstitutional nature of the Fee affects the Ferry Company. Thus, the Ferry Company has proved that it has in fact suffered

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See, e.g. Sierra Club v. Morton, 405 U.S. 727, (1972). The Ferry Company proved constitutional injury at trial, but it did not prove any monetary damages resulting from that injury.

[35] Dennis v. Higgins held that a cause of action under 42 U.S.C. § 1983 existed for a violation of the dormant Commerce Clause because "the combined restriction on state power and entitlement to relief under the Commerce Clause amounts to a 'right, privilege, or immunity' under the ordinary meaning of those terms." Although this case was not brought under § 1983, the same reasoning should apply to violations of the Commerce Clause brought by individuals under the Constitution itself pursuant to "federal question" jurisdiction conferred by 28 U.S.C. § 1331. While lawsuits for violations of constitutional rights including economic rights such as those under the Commerce Clause are increasingly brought under § 1983, there continues to be a viable cause of action pursuant to § 1331. See Michael G. Collins, 'Economic Rights,' Implied Constitutional Actions, and the Scope of Section 1983, 77 Geo. L. J. 1493 (1989).

The same damages analysis applies to the Tonnage Clause violations.

nominal constitutional injury due to the Port Authority's unconstitutional practice, and is awarded nominal damages.

The ferry passengers, however, who are the actually fee payers, were damaged by paying fees in excess of constitutionally appropriate levels which were used to fund activities that did not benefit them as Port users. Thus, the passenger plaintiff D&D is awarded damages in the amount of $494.63, representing the Court's best estimate, according to the calculation discussed above, of the amount by which the Passenger Fees paid exceeded constitutionally appropriate levels and thus benefitted the Port Authority to the detriment of the passengers.

H. Declaratory Judgment

The plaintiffs request a declaratory judgment that the Port Authority is barred from imposing or collecting the Passenger Fee to the extent that it exceeds, or is calculated to exceed, the reasonable cost to the Port Authority of the facilities and services that the Port Authority actually provides to the ferry operation.

The Declaratory Judgment Act provides in relevant part:

> In a case or controversy within its jurisdiction. . .any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief could be sought. Any such declaration shall have the force and

> effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a). The Second Circuit has stated that "two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Broadview Chemical Corp. v. Loctite Corp., 417 F.2d 998, 1001 (2d Cir. 1969).

Under these criteria, the Court finds that a declaratory judgment would be neither appropriate nor helpful in this case. The legal relationship between the parties does not require clarification, and the Court's findings on the substantive claims and the permanent injunction will provide the necessary relief to the plaintiffs.

G. Permanent Injunction

Generally, to obtain a permanent injunction a party must show the absence of an adequate remedy at law and irreparable harm if the relief is not granted. New York State Nat. Org. for Women v. Terry, 886 F.2d 1339, 1362 (2d Cir. 1989). "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n. 12 (1987). "To obtain a preliminary injunction a party must demonstrate: (1) that [he or she] will be irreparably harmed if an injunction is not granted, and (2) either

(a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation, and a balance of the hardships tipping decidedly in its favor." Lusk v. Village of Cold Spring, 475 F.3d 480, 485 (2d Cir. 2007).

The Ferry Company and passenger plaintiffs have succeeded on the merits of their constitutional claims. This Court agrees with the plaintiffs, for the reasons discussed above, that the imposition of the Passenger Fee as currently charged and calculated is a violation of the Commerce Clause to the extent that it funds activities of the Port Authority unrelated to and that do not benefit the ferry passengers, and also violates the Tonnage Clause. The passenger plaintiffs, as well as any other future ferry passengers, will be irreparably harmed if the Port Authority were permitted to continue its practice of instituting a Passenger Fee in violation of the Constitution. There is no adequate remedy at law which would prevent the occurrence of this future constitutional harm, and the plaintiffs have succeeded on the merits of their claim.

The Court hereby enjoins the Port Authority from the further use of the revenues from the Passenger Fee to fund its activities that are unrelated to and do not benefit the ferry passengers or approximate their use of the Port. The Port Authority shall not be allowed to collect a Passenger Fee in an amount that exceeds what is necessary for their expenses that benefit ferry passengers and fairly approximate their use of the Port. The Court has made factual findings as to which of the Port Authority's activities were properly funded by the Passenger Fee revenues and which were not properly funded by the Passenger Fee based on the

benefit of these activities to the ferry passengers. These findings should serve as guidance to the Port Authority in its future in its future calculations of an appropriate Passenger Fee.

H. Affirmative Defenses

The Court finds the Port Authority's affirmative defenses to be without merit for the reasons detailed above.

III. Conclusion

The plaintiff Bridgeport & Port Jefferson Steamboat Company is awarded nominal damages in the amount of one dollar. The plaintiff D&D Flowers is awarded damages in the amount of $494.63.

The Port Authority is enjoined from the further use of the revenues from the Passenger Fee to fund its activities that are unrelated to and do not benefit the ferry passengers or approximate their use of the Port, and the Passenger Fee shall be reduced accordingly. The Port Authority shall not be allowed to collect a Passenger Fee in an amount that exceeds what is necessary for their expenses that benefit ferry passengers and fairly approximate their use of the Port.

The defendant's Oral Motion for Judgment as a Matter of Law [Dkt. # 163] is DENIED as moot in light of this decision.

SO ORDERED this 3rd day of July 2008, at Hartford, Connecticut.

/s/ Christopher F. Droney
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 31st day of July, two thousand and nine,

Docket Number: 08-3886-cv

[Filed July 31, 2009]

Bridgeport and Port Jefferson Steamboat Company, Frank C. Zahradka, and D & D Wholesale Flowers, Inc., Plaintiffs-Appellees,	)
v.	)
Bridgeport Port Authority, Defendant-Appellant.	)

ORDER

Appellant Bridgeport Port Authority having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc,* and the panel that determined the appeal having considered the request for panel

rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/
Frank Perez, Deputy Clerk

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(2)

No. 09-528

DEC 4 - 2009

IN THE

Supreme Court of the United States

BRIDGEPORT PORT AUTHORITY,

Petitioner,

v.

BRIDGEPORT AND PORT JEFFERSON STEAMBOAT COMPANY, FRANK C. ZAHRADKA, and D & D WHOLESALE FLOWERS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a ferry passenger fee imposed by a governmental port authority excessive, and to that extent prohibited by the Commerce Clause – under the test established in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), and applied in *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 369 (1994) – where the fee funds essentially all of the authority's operating costs, but most of the authority's activities are unrelated to and confer no benefit on the passengers who pay the fee?

2. Is such a fee also prohibited by the Tonnage Clause – as interpreted in *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935), and *Polar Tankers, Inc. v. City of Valdez*, __ U.S. __, 129 S. Ct. 2277 (2009) – where the main purpose and effect of the fee is to raise revenue for general municipal purposes?

CORPORATE DISCLOSURE STATEMENT

All of the stock of respondent Bridgeport and Port Jefferson Steamboat Company is owned by its parent corporation, McAllister Towing and Transportation Company, Inc., which is a privately held company.

None of the stock of respondent D & D Wholesale Flowers, Inc. is owned by any privately or publicly held company.

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STATEMENT OF THE CASE[1]

Respondents, Bridgeport and Port Jefferson Steamboat Company (the "Ferry Company"), D & D Wholesale Flowers, Inc. and Frank C. Zahradka, submit this opposition to the petition for a writ of certiorari filed by Bridgeport Port Authority (the "Port Authority").

a. Introduction.

The statement of the case in the petition omits or mischaracterizes important parts of the record. The relevant facts are accurately summarized in the Second Circuit's decision (App. pp. 1a to 12a) and, in greater detail, in the District Court's decision (*id.*, pp. 23a to 54a). Therefore, instead of repeating the relevant facts, we provide herein a brief summary; in the remainder of this statement we address the most glaring omissions and mischaracterizations in the Port Authority's statement.

The essential facts were substantially undisputed at trial. Since its inception in 1993, the Port Authority has funded essentially all of its operating expenses from the passenger fee at issue in this case (App. pp. 7a to 8a, 30a to 33a). Yet the activities of the Port Authority, by design and in fact, have ranged far beyond the ferry

1. The following references are used herein: "**App.**" refers to the Appendix to the Petition in this case. "**E-**" (followed by page numbers) refers to the Exhibits to the Joint Appendix filed with the Second Circuit, which include the trial transcript as well as documents admitted as evidence at trial. References to the trial transcript include page and line numbers.

operation at the Bridgeport dock (*id.*, pp. 16a to 17a, 40a to 46a). The proceeds of the passenger fee have greatly exceeded the Port Authority's cost of the facilities and services it has actually provided to the ferry operation (*id.*, pp. 61a to 67a).

That excess, or overcharge, is illegal under the Commerce and Tonnage Clauses, as both lower courts have held. Under each clause, a government agency's user fee, such as the ferry passenger fee in this case, must not exceed the agency's reasonable cost of the services and facilities it provides to the fee payers (Points II and III below; *see also* App. pp. 14a to 19a, 55a to 69a).

The Port Authority has perverted the concept of a user fee; it has "taxed" a captive audience – the ferry passenger – excessively in order to fund a broad range of activities wholly unrelated to the ferry operation. The Commerce and Tonnage Clauses properly place limits on user fees to prevent such abuse. The Port Authority clearly has exceeded those limits in this case.

b. The facts were established at trial.

The Petition omits to state that the District Judge determined the facts after presiding over a five-day bench trial (App. p. 24a; E-1:1 through 1007:12, 2338-2445). The Court of Appeals did not disturb any of his essential factual findings (App. pp. 1a to 20a).

c. The ferry operation is confined to the "Dock."

The Petition fails to state that the Port Authority provides facilities and services to the ferry and its passengers *only* at a three-acre dock, which contains the ferryboat landing, a terminal building, an access road, and a staging area for vehicles waiting to board the ferry (the "Dock") (App. p. 59a; *see also id.*, pp. 26a to 29a). It was undisputed at trial that the Port Authority provides no facilities or services to the ferry or its passengers at any other location (E-65:13-16, E-420:24 to 421:2, E-241:20 to 243:15). As summarized in the next section, the Port Authority's activities range far beyond the Dock, both geographically and functionally.

d. The Port Authority's *non*-ferry activities extend far beyond the Dock and neither relate to nor benefit the ferry operation.

The Petition fails to describe fairly the extent to which the Port Authority's activities extend far beyond the Dock, both geographically and functionally, and neither relate to nor benefit the ferry operation. The Port Authority's geographic jurisdiction extends to all land (other than residential and park land) within 1,000 feet of Bridgeport Harbor, the two rivers that empty into it – the Yellow Mill and Pequonnock Rivers – and Black Rock Harbor, as well as certain other properties beyond those boundaries, including the 50-acre Steel Point peninsula, the 48-acre Bridgeport Regional Maritime Complex ("BRMC"), the Cilco Shipping Terminal, the Remington Woods, and the former General Electric factory (App. p. 26a).

Functionally, the Port Authority has devoted substantial financial resources, funded by the passenger fee, to projects and activities that, as the courts below found, are unrelated to and confer no benefit on the ferry passengers who pay the fee. These projects include:

(a) a project to establish a "high-speed ferry" service, whose boats would not carry vehicles and would ply different routes than that of the passenger and vehicle ferry at issue in this case;

(b) a project to start up a "barge feeder" service, which would ship containers by barge from the New York area and offload them in Bridgeport for transshipment by truck to other destinations;

(c) efforts to develop the 50-acre Steel Point peninsula;

(d) operation of a Free Trade Zone;

(e) supervision of three commercial shipping terminals;

(f) operation of a "pump-out" service for pleasure boats;

(g) acquisition of the land by condemnation and development of the 48-acre BRMC property, including improvements to and leasing of 23 acres to the privately-owned Derecktor Shipyard;

(h) review and determination whether to approve all proposed projects within its jurisdiction;[2]

(i) management of marinas;

(j) efforts to dredge the harbor, which would benefit the commercial shipping terminals but is not needed for the ferryboats; and

(k) condemnation of land for the benefit of a private aircraft manufacturer.

(App. pp. 40a to 46a.)

Even more egregiously, the Port Authority has spent funds collected from ferry passengers on a variety of perquisites and discretionary expenses, including season tickets to local minor league baseball and hockey teams; automobile lease, gasoline purchases and car washes for the executive director; charitable contributions; travel expenses for numerous trips unrelated to the ferry; personal long-distance telephone calls; club memberships; and Christmas gifts (*id.*, p. 46a; E-282:17 to 283:15; E-2005).

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2. These projects have included, among many others, a dog kennel, an asphalt plant, a paper recycling plant, and a commercial laundry facility (App. p. 45a).

e. Essentially all the Port Authority's operating revenue is derived from the ferry operation.

The Petition misleadingly states that its "budget is financed through several revenue streams," mentioning, among others, lease revenue from Derecktor Shipyard and dockage fees (Petition p. 4). In fact, such dockage fees are "minimal" (App. p. 30a n. 7) – only $3,750 since the Port Authority was established in 1993 (Tr. 485:8 to 486:1), compared to $9.5 million in passenger fees over the same period (App. 30a, 32a to 33a) – and any revenue from Derecktor is passed through to the City of Bridgeport (App. p. 30a n.7). Thus, "essentially all" of the Port Authority's operating expenses are funded by the ferry operation – the passenger fee and the lease payments made by the Ferry Company and its food services affiliate (App. pp. 8a, 30a to 33a).

f. The "Net Revenue Reports" verify that more than half the Port Authority's expenses do not relate to the Dock or to ferry passengers.

In a glaring omission, the Petition does not even mention these reports, which were a critical piece of the evidence at trial, and which the District Judge discussed at length in his decision (App. pp. 34a to 37a). The Port Authority and its outside auditors certify each year the net revenue that the Port Authority realizes from the Dock. The calculation is necessary because the Port Authority is contractually required to pay to the City of Bridgeport 15 percent of the Port Authority's annual net revenue from the Dock. The only revenue that the Port Authority takes into account in these reports is the passenger fee. To arrive at the "net revenue," of which 15 percent is payable to the City, the Port

Authority and its auditors determine what percentage of each expense category is allocable to the Dock. With few exceptions, the Port Authority and its auditors consistently have allocated 50 percent of each expense category to *non*-Dock activities. As the District Court found, even these allocations over-estimate the percentage of the expenses that the Port Authority has actually devoted to the Dock and ferry operation (*id.*, pp. 36a to 37a).

The net revenue reports thus constitute powerful evidence, from the Port Authority's own records and certified by its outside auditors, that more than half its expenses do not relate to the Dock or the ferry passengers, even though the passenger fee funds essentially *all* of the Port Authority's expenses. As the District Judge found, the net revenue reports are "tantamount to an admission on the part of the Port Authority that its expenditures were largely not related to the ferry operation or the Dock" (*id.*, p. 36a).

REASONS FOR DENYING THE PETITION

I. The Case Is Unworthy of Review Generally

The Petition cites a single consideration allegedly warranting review by this Court: that the Second Circuit's decision in this case conflicts with relevant decisions of this Court. *See* Supreme Court Rule 10(c). The Petition does not allege that the Court of Appeals' decision conflicts with that of another court of appeals, or of a state court of last resort, or that any other of the usual considerations governing review on certiorari apply in this case. *See* Supreme Court Rule 10(a) and (b).

As shown below, however, the Second Circuit carefully applied, and in no way departed from, this Court's relevant decisions analyzing user fees under the Commerce and Tonnage Clauses. The Port Authority's true objection is with the way in which the Second Circuit, as well as the District Court, applied the facts of this case to this Court's established precedents.[3] Even if the lower courts had misapplied the facts to a properly stated rule of law – which they did not do – that would not be a proper basis for this Court to grant a writ of certiorari. *See* Supreme Court Rule 10, last sentence; *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); E. Gressman, K. Geller, S. Shapiro, T. Bishop & E. Hartnett, *Supreme Court Practice* § 4.14, at 271-72 (9th ed. 2007) (hereinafter cited as "Gressman") (citing other cases to the same effect).

The courts below held that the fee in this case was excessive under *both* the Commerce Clause *and* the Tonnage Clause, although a violation of *either* would have been sufficient to support the judgment below. Thus, even if the Second Circuit's decision were in error as to one, but not both, of these grounds, the outcome in this case would not change. Accordingly, there would be no reason for the Court to grant the petition. *See* Gressman, § 4.4(f) (the Court may deny certiorari despite a clear conflict between circuits, if resolution of the conflict would not change the outcome of the case, citing

3. There was unanimity among the judges who considered the issues below. The two-member panel of the Second Circuit agreed with the District Judge, and none of the Circuit Court's judges dissented from the denial of the Port Authority's petition for rehearing en banc.

the denial of certiorari in *Sommerville v. United States*, 376 U.S. 909 (1964)).

II. The Commerce Clause

The parties, the District Court, and the Second Circuit all agreed that the test established in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), should be used to determine the legality of a user fee under the Commerce Clause (App. pp. 8a, 14a). This Court applied the *Evansville* standard, re-phrasing it as a three-part test, in *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 369 (1994). The Second Circuit, like the District Court, correctly stated the test (App. pp. 9a, 14a, 55a to 56a), and both courts then applied the test to the established facts of this case (App. pp. 14a to 18a, 56a to 67a).

The Petition claims, but does not demonstrate, that the Second Circuit's decision conflicts with *Evansville*. Its argument fails to take into account the important factual differences between *Evansville* and this case.

Evansville involved a geographically and functionally discrete facility – an airport. This case, in contrast, involves a geographically far-flung port district comprising more than 100 acres, spread over two harbors and including land adjacent to the harbors and their two tributary rivers, in which the Port Authority performs a broad variety of activities. Many of these activities concern the economic development of the entire region and have no connection whatsoever to the passenger ferry operation, which is confined to the

three-acre Dock (App. pp. 15a to 17a). The Second Circuit quoted testimony by the Port Authority's own expert witness and officials that the Port Authority's function is to foster economic growth in "the entire community," and even throughout the State of Connecticut (App. p. 19a).

The Second Circuit properly distinguished *Evansville* on these facts (*id.*). It pointed out that the airport facilities in *Evansville* were built "primarily to meet [the] special needs" of the commercial airlines that paid the fee (App. p. 15a) (quoting *Evansville*, 405 U.S. at 718-19), whereas the Port Authority in this case pursues "a variety of tasks, only some of which afford actual or potential benefits to the ferry passengers" (App. p. 15a). The District Court factually distinguished *Evansville* for similar reasons (App. pp. 60a, 63a to 64a).

In its Petition, the Port Authority quotes from *Evansville* – that "fifty per cent [of passenger fee revenue was] allocated to the municipalities or airport authorities owning the landing areas at which the fees were imposed in the form of unrestricted general revenues" (Petition p. 11, quoting *Evansville*, 405 U.S. at 720) – ostensibly for the proposition that an authority may impose a user fee to support general municipal purposes. That proposition is incorrect. As the Court in *Evansville* stated, regardless of how the fee revenue was allocated, the passenger fee revenue never exceeded the local authorities' actual *airport* costs. 405 U.S. at 720. In this case, by contrast, the Port Authority spends most of the passenger fee revenue on regional development projects, away from the Dock, which are unrelated to the ferry operation. The Port

Authority thus improperly equates the airport in *Evansville* to the entire port district in Bridgeport. As both the District Court and the Court of Appeals held, however, the airport in *Evansville* is properly analogized to the Dock, not the entire port district, because the Port Authority's non-Dock activities are neither physically nor *functionally* related to the ferry operation (App. pp. 16a and 63a).

In its Petition, the Port Authority repeatedly and incorrectly implies that, contrary to the teaching of *Evansville*, the lower courts required a "dollar-for-dollar" correspondence between the fees it collects from passengers and the amounts it spends for their benefit (Petition pp. i [Question 1], 8, 10). In fact, the District Judge expressly acknowledged that *Evansville* does not require "a 1:1 relationship" between the actual use of services and the cost of providing such services (App. pp. 58a to 59a) (quoting *New York State Dept. of Environmental Conservation* [*Jorling*] *v. U.S. Dept. of Energy*, 850 F. Supp. 132, 142-43 (N.D.N.Y. 1994), *aff'd sub nom. Jorling v. United States Dept. of Energy*, 218 F.3d 96 (2d Cir. 2000)). His decision that the fee in this case fails the "fair approximation" prong of the *Evansville* test was not based on a failure to adhere to a "dollar-for-dollar" relationship, but rather on the absence of any "rational relationship between the method used to calculate the Passenger Fee and the benefits available to the Passenger Fee-payers" (App. p. 59a).

The Second Circuit also expressly disavowed a "dollar-for-dollar" correspondence between the fee collected and the cost of the benefits conferred. It noted that this Court "has never held that the amount of a

user fee must be precisely calibrated to the use that a party makes of Government services" (App. pp. 14a to 15a) (quoting *United States v. Sperry*, 493 U.S. 52, 60 (1989)). But, the Second Circuit continued, "the discrepancy here exceeds permissible bounds" (App. p. 15a). As the District Court put it, "the difference between the amount of the fee and the benefits received by the ferry passengers is *vast*" (App. p. 69a, emphasis added).

The Petition also falsely states that the lower courts "ignored" $14 million in government grants that the Port Authority used to improve Dock facilities (Petition p. 9). In fact, both lower courts discussed these government grants (App. pp. 4a to 5a, 34a). The District Court expressly, and correctly, rejected the Port Authority's argument that it may charge passengers for the capital costs of projects that were funded, not by the Port Authority itself (from the passenger fee), but by federal and state government grants. The District Judge properly reasoned that the Port Authority may recoup from the passenger fee its own ferry-related *operating* costs of pursuing these capital projects – "personnel time, overhead, advertising, and other tangential costs" – but not the *capital* costs, which were funded by other government entities (App. p. 34a). *See Clallam County v. Dept. of Transportation*, 849 F.2d 424, 430 (9th Cir. 1988) (state agency that receives federal funds under Federal Highway Act, 23 U.S.C. § 101 *et seq.*, may charge tolls to recover its own, but not the federal government's, funding contributions). The Port Authority has not cited, in its Petition or below, a single decision by any court holding that an agency may justify imposing user fees based on costs that it does not incur

itself, but rather that other government entities incur in the form of grants to the agency.

The Port Authority's statement that the Passenger Fee is "a relatively small portion of the total ferry ticket price" (Petition p. 3) is true, but meaningless. Under *Evansville*, the fee must not be excessive in relation to the benefits the agency confers on the fee payer, not in relation to other costs incurred by the fee payer. For example, the passengers' cost of airfare was irrelevant, and was not even mentioned, in *Evansville*.

Finally, the Port Authority claims that the District Court erred (and that the Second Circuit should have so held) because, instead of giving the Port Authority essentially unbound "deference," the court "scrutinized every expenditure [of the Port Authority] as if it were conducting an audit" (Petition p. 8). The Port Authority even criticizes the District Judge for "examining in detail the Port Authority's activities (including such minutiae as . . . phone calls by administrative staff)" (*id.*, p. 6).

This criticism is grossly misplaced. The District Court properly examined the Port Authority's cost structure to determine the relationship, if any, between the passenger fee revenue and the cost of the facilities and services that the Port Authority provides to passengers. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-22 n.12 (1981) (under the Commerce Clause, "we have required a showing, *based on factual evidence in the record*, that the fees charged do not appear to be manifestly disproportionate to the services rendered") (emphasis added, internal quotations omitted); *see also Evansville*, 405 U.S. at 719-20 (citing

record evidence of fee revenue and bond retirement costs); *Northwest*, 510 U.S. at 359-60 (comparing airport's surplus from concession leases with shortfall from general aviation). How else, but by examining an agency's cost structure, could a district court determine – as it must under the first and second prongs of the *Evansville* test – whether a user fee (1) is based on a "fair approximation" of the fee payer's use of the facilities, or (2) is "excessive in relation to the benefits conferred"?

In sum, in holding that the passenger fee is excessive under the Commerce Clause, both lower courts followed the *Evansville* test and properly applied it to the established facts of this case.

III. The Tonnage Clause

As with the Commerce Clause, the Port Authority argues, but cannot show, that the Second Circuit applied the wrong legal standard under the Tonnage Clause. The Circuit Court discussed and clearly applied the standard set forth in *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935), and in circuit court cases that followed it (App. pp. 11a, 18a to 19a). The District Court also began its Tonnage Clause analysis with, and clearly applied, *Clyde Mallory* (App. p. 67a).

At the time the Second Circuit issued its decision, on May 29, 2009, *Clyde Mallory*, decided in 1935, was this Court's most recent analysis of the Tonnage Clause. About two weeks later, on June 15, 2009, the Court decided *Polar Tankers, Inc. v. City of Valdez*, __ U.S. __, 129 S. Ct. 2277 (2009). *Polar Tankers* confirms the

correctness of the Tonnage Clause holding below and forecloses any conceivable argument for reversal in this case.

The lower courts in this case recognized that the Tonnage Clause does not prohibit a state from levying a charge on a vessel "for services rendered to and enjoyed by the vessel, such as pilotage, or wharfage," or the "use of locks" (App. p. 67a to 68a [quoting *Clyde Mallory*, 296 U.S. at 265-66]; App. p. 11a [same]). This Court also recently so noted in *Polar Tankers*, 129 S. Ct. at 2283-84. The lower courts' conclusion that the passenger fee in this case goes far beyond such a permissible charge is entirely consistent with the Court's holding in *Polar Tankers*.

In *Polar Tankers*, the city of Valdez, Alaska, levied a tax on large ships that made substantial use of its port facilities. The city did not use the revenue from the tax exclusively, or even mainly, to provide services to the vessels. "To the contrary, the . . . tax [was] designed to raise revenue used for general municipal purposes." 129 S. Ct. at 2284. As the Court stated, because the imposition of the tax "is not for services provided to the vessel, it is unconstitutional." *Id. See also New Orleans Steamship Ass'n v. Plaquemines Port, Harbor & Terminal District*, 874 F.2d 1018, 1020 (5th Cir. 1989) (the Tonnage Clause "prohibits . . . duties to raise general revenues"); *Clyde Mallory*, 296 U.S. at 266 (the Tonnage Clause requires that the service be available to all fee payers).

The facts in this case are closely analogous to those in *Polar Tankers*. The Port Authority exacts a fee from

ferry passengers but spends a very substantial portion of the proceeds on projects and activities unrelated to, and that do not benefit, the passengers or the ferry service. The Port Authority's own officials readily conceded at trial, as the Second Circuit noted, that they use the passenger fee revenue to fund the Port Authority's broad purpose of fostering economic development in the entire city, and even beyond (App. p. 19a).[4] On these undisputed facts, the District Court's conclusion that the Port Authority imposes the passenger fee "for the impermissible purpose of raising general revenues" (App. p. 69a) is unassailable.

In challenging the lower courts' Tonnage Clause analysis, the Port Authority states that other courts have approved fees that supposedly were used to fund

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4. As summarized in the Second Circuit decision, the Port Authority's expert testified that the Authority "act[s] as an incubator for growth of economic activity that supports the city itself"; the Port Authority's auditor testified that non-ferry projects benefit the City and "the entire community"; a Port Authority commissioner testified that the purpose of the passenger fee has always been "to create a source of revenue to support the operations of the Port Authority"; and the Port Authority's executive director testified,

> I think anything that helps business and commerce in the State of Connecticut is going to indirectly benefit the ferry passengers. . . . We don't work for the Port Jefferson Ferry Company or the Port Jefferson ferry passengers. We're a Port Authority and this is what we do. We're developing the port as our mission, bringing other maritime interest and businesses to the Port of Bridgeport.

(App. p. 19a).

"general services" (Petition p. 13) (citing *Barber v. Hawaii*, 42 F.3d 1185, 1196 (9th Cir. 1994), and *Captain Andy's Sailing, Inc. v. Johns*, 195 F. Supp. 2d 1157, 1175 (D. Hawaii 2001) ["*Johns*"]). Yet the services involved in those cases were intended and available for use by the vessel owners who paid the fee. In *Barber*, the vessel owners conceded that they "receive use of restroom facilities, parking, trash disposal, and security from the state." 42 F.3d at 1196. And in *Johns*, the vessel challenging the fee had "unfettered access" to the improvements at the small-boat harbor that were funded by the fee, such as a breakwater, security, lights, and parking. 195 F. Supp. 2d at 1175. In this case, by contrast, both lower courts found that the bulk of the Port Authority's services "are not available to ferry passengers" (App. p. 19a; *see also id.*, p. 69a).

The Port Authority *incorrectly* states that the court in *Johns* approved a fee on vessels even though the amounts collected were "ten times higher" than the expenses made on the vessels' behalf (Petition p. 13). It was the vessel owner, not the court, who asserted that the fees collected were ten times higher than the cost of the benefits conferred. The court disregarded that calculation because it failed to take into account overhead costs that were allocable to the relevant harbor. 195 F. Supp. 2d at 1175 (Conclusions of Law 34-35). Significantly, in the same decision the court held that a fee imposed on another vessel, operating in Hawaii's Na Pali Coast waters, violated the Tonnage Clause, because that fee "does not relate to a specific service that confers a readily perceptible benefit to vessels operating" in those waters. *Id.* at 1173 (Conclusions of Law 19-20).

Finally, the Port Authority repeats the argument it makes with respect to the Commerce Clause, that the lower courts failed to give the Port Authority credit for ferry-related capital improvements that were funded by federal and state grants (Petition p. 14). The Port Authority wrongly accuses the lower courts of "ignoring" the benefits accruing to passengers from these capital projects (*id.*), and wrongly characterizes the grant funds as "costs incurred by the Port Authority" (*id.*).

As noted in Point II above (at pp. 12-13), neither the District Court nor the Second Circuit ignored the government grants. The District Court expressly rejected the Port Authority's argument that it may recoup, through a user fee, costs that it did not actually incur, but rather that it received as grants from other governmental units (App. 34a). The Port Authority's position, if accepted, would lead to absurd results. In the context of *Polar Tankers*, for example, if the federal government were to award the city of Valdez $100 million to improve the harbor facilities, under the Port Authority's analysis, the city would be entitled to "recoup" those costs *for itself* by taxing ships that use the harbor. The idea makes no sense, and the Port Authority cites no decision to support it. As noted above (p. 12), the Ninth Circuit has expressly rejected it. *Clallam County*, 849 F.2d at 430.

Accordingly, the Second Circuit correctly held that the passenger fee is excessive, and violates the Tonnage Clause, to the extent it is used to raise revenue for general municipal purposes. The judgment below is entirely consistent with this Court's very recent analysis in *Polar Tankers*, and raises no issue requiring the Court to again analyze that seldom litigated constitutional provision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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BRIDGEPORT PORT AUTHORITY,
Petitioner,

v.

BRIDGEPORT AND PORT JEFFERSON STEAMBOAT COMPANY, FRANK L. ZAHRADKA, and D&D WHOLESALE FLOWERS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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ARGUMENT

I. The Decisions Below Conflict With The Court's Dormant Commerce Clause Jurisprudence Because They Constitute Judicial Rate-Making

Even assuming that *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), still applies to user fees charged by entities such as the Bridgeport Port Authority,[1] the courts below both misconstrued the facts of the case and issued decisions that directly conflict with practices this Court approved.

The Court has consistently recognized that courts "are scarcely equipped to oversee . . . rate structures

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[1] *Evansville* itself no longer applies to fees charged for use of airport facilities. *See* 49 U.S.C. § 1513 and *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 9-10 (1983). Indeed, since *Evansville* was decided, Congress abandoned any reliance upon cost-based regulation in all forms of the transportation industry — preferring instead to allow facilities and service providers in the national transportation system to base their fees on market factors. *See, e.g.*, Ocean Shipping Reform Act of 1998, Pub. L. 105-258, 112 Stat. 1902 (1998); Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (1980); Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (1980); Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1705 (1978); Ocean Shipping Act of 1978, Pub. L. 95-483, 92 Stat. 1607 (1978); and Railroad Revitalization Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31 (1976). Moreover, the Court has recognized that the dormant Commerce Clause does not apply to governmental entities acting as market participants. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 807-810 (1976). The inquiry is fact-specific. *See, e.g., Selevan v. New York Thruway Authority*, 584 F.3d 82, 93 (2d Cir. 2009). The courts below, however, did not conduct that inquiry in this case.

and practices." *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366 (1994). Yet, the district court not only engaged in an examination akin to an audit, it issued an injunction that ensures that the court will remain entangled in deciding questions of whether this activity or that benefits the passengers for the foreseeable future. *See* App. B at 21a-22a. Indeed, the passenger fees that the Port Authority may charge after 2004 remain in limbo to this day because the district court has not decided, and the parties have not agreed upon, the appropriate amount of fees that are "necessary for their [the Port Authority's] expenses that benefit ferry passengers and fairly approximate their use of the Port." App. B at 22a.

This Court's dormant Commerce Clause jurisprudence is not, and has never been interpreted as, an invitation to the lower courts to engage in the kind of judicial rate-making the district court has done here, and must do in the future if the Port Authority is to comply with the injunction. The determination of the proper amount of user fees is essentially a legislative function, not a judicial one. *See, e.g., Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 589 (1945). The district court's unwarranted intrusion into the Port Authority's exercise of its rate-making is not only inconsistent with cases such as *Evansville* and *Northwest Airlines*, but also with the entire thrust of national policy as set by Congress over the past thirty years.

Respondents say that *Evansville* involved a "geographically and functionally discrete facility — an airport," while this case involves a "far-flung" port district. Resp. Br. at 9. But this ignores the fact that

the fees at issue in *Evansville* were charged only to a minority of the airport's users — emplaning commercial passengers. *See Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 255 Ind. 436, 441, 265 N.E.2d 27, 30 (1970). And the so-called "discrete" facilities that were funded by the fee included far more than just the portion of the airport used by the commercial airlines themselves. The fee also paid for facilities that commercial passengers never used, such as air freight service counters and facilities, nonscheduled airlines' hanger facilities, office space and waiting areas, fuel storage areas, and airport office space. *See id.*, 255 Ind. at 440, 265 N.E.2d at 29.

More importantly, the decision of the court below contradicts *Evansville* on every significant point.

Evansville identified three factors to consider in determining whether a user fee violates the Commerce Clause: (1) whether it discriminates against interstate commerce; (2) whether it reflects a "fair, if imperfect, approximation of the use of the facilities for whose benefit they are imposed"; and (3) whether the fees are excessive in relation to the costs incurred by the taxing authorities in providing the benefits conferred. *See Evansville*, 405 U.S. at 717-720. *See also Northwest Airlines, Inc. v. County of Kent*, 510 U.S. at 369.

The district court found, and the court of appeals agreed, that the fee did not discriminate against interstate commerce. *See* App. C at 56a; App. A at 14a. The basis of the fee was the passengers' use of the Port Authority's facilities — the dock, the terminal, the parking lot, and the access road.

The gravamen of respondents' claim was that the fees were excessive in relation to the Port Authority's costs of providing benefits to the passengers. The district court included in the benefits provided to the passengers only that part of the passenger fees that was spent directly on the dock and related facilities. Respondents say that the district court did not ignore the grants used to pay for substantial improvements to the dock and terminal facilities because it mentioned them in its opinion. Resp. Br. at 12. But the point is not whether the opinion acknowledged the existence of the grants, but whether it should have taken into account *all* of the benefits conferred on the passengers by the Port Authority in determining whether the fees fairly approximated those benefits.

Over the entire 12 years since the fee was imposed to the date of trial, the Port Authority's net income from the ferry operations (including the passenger fees, the lease of the dock, and other miscellaneous fees) was $10,067,157 versus expenses for all activities in the entire district of $9,858,904 — an excess of about $200,000. In each of the last three years covered by the lawsuit (2002-2004), the Port Authority's expenses exceeded the net income it received from the ferry operations, with the total expenses exceeding the total ferry income over that period by about $600,000. App. C at 32a-33a.

These calculations did not take into account that the Port Authority obtained $14,000,000 in grants to improve the dock, the terminal, and related facilities. Although the passengers and the ferry company were the principal beneficiaries of the grants, they paid nothing for them. Had the passengers been required to pay for these improvements, the fees would have been

more than 50% higher. No one disputes that. Respondents wrongly accuse the Port Authority of arguing that it can recoup the value of the grants from the ferry passengers. That is not the case.

The issue before the Court is not whether the Port Authority can recoup this amount, but rather whether the courts should consider all benefits conferred on the user when considering whether the fee is a fair approximation of the use of the facilities.

The Port Authority's total expenditures for the entire period from 1993 to 2004 were more than $23,000,000, of which more than $18,000,000 directly benefited the passengers. Yet the passengers actually paid only about 25% of the costs incurred by the Port Authority in providing the benefits conferred on them. By any standard, charging the passengers 25% of the cost of the benefits enjoyed by them (with the remaining 75% paid by the taxpayers) is a "fair approximation" of the use the passengers made of the facilities. The passenger fees were not excessive viewed in this light.

Respondents also suggest that 15% of the fees were improperly paid into the City of Bridgeport's coffers. Resp. Br. at 6-7. But this figure represents a contractual obligation the Port Authority owes the City under the parties' 1993 Property Management Agreement. App. C at 34a-35a. Even if this percentage was allocated to general revenue, it would not rise to the level of a constitutional violation. In the New Hampshire case (also decided in *Evansville*), the municipalities deposited 50% of the fees into unrestricted general revenue accounts without

offending the Constitution. *See Evansville*, 405 U.S. at 720.

Finally, respondents quarrel with petitioner's contention that the district court improperly went beyond the "fair approximation" analysis. When the district court concerns itself with whether some few dollars out of the millions collected since 1993 were spent on baseball tickets or personal long-distance telephone calls, it has crossed the line from assessing whether the Port Authority's fees were a "fair approximation" of its costs to micro-management.

II. The Decisions Below Conflict With The Court's Tonnage Clause Jurisprudence Because The Tonnage Clause Applies Only To Duties Levied On Vessels Or Their Owners, Not To Fees Paid By Passengers

The lower courts based their Tonnage Clause rulings on two false premises: that the Port Authority charged the passenger fees to the ferry company or its vessels, and that the Tonnage Clause applies to passengers, as well as vessels.

The record is clear that the ferry company did not pay the passenger fees. Rather, it collected the fees, and (after keeping a portion for administrative expenses) remitted them to the Port Authority. App. C at 30a. Theoretical damages resulting from a theoretical decrease in passengers do not establish a Tonnage Clause violation. (In fact, the evidence showed that there was an increase in passengers after the fees were imposed.) The only recoverable damages for a Tonnage Clause violation are measured by the excess of the duties charged to the vessel over the

benefits conferred upon it. The ferry company was charged nothing, and thus it had no standing to raise a Tonnage Clause complaint. And, of course, the passengers are not the vessel owners — so they had no standing to raise a Tonnage Clause claim either.

The Constitution prohibits a State "without the Consent of Congress, [to] lay any Duty of Tonnage." U.S. CONST. art. I, § 10, cl. 3. The Tonnage Clause protects maritime *vessels* from improper taxation by seaboard States by prohibiting States from imposing taxes or fees upon vessels unless the States have some rational basis for the tax or fee apart from the mere privilege of using the States' ports. *Huse v. Glover*, 119 U.S. 543, 550 (1886).

Historically, the words "Duty of Tonnage" referred to "'a duty' imposed upon a ship, which duty vari[ed] according to 'the internal cubic capacity of a vessel,' *i.e.*, its tons of carrying capacity." *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2281-82 (2009) (*citing Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265 (1935)) (additional internal citations omitted). Following that definition, this Court's early cases interpreted the Tonnage Clause as a prohibition on "a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country." *Huse*, 119 U.S. at 549-50. As confirmed recently in *Polar Tankers*, the Tonnage Clause prohibits "any duty *on the ship*[,]" *id.* at 2283 (*quoting Steamship Co. v. Portwardens*, 73 U.S. 31, 35 (1867)) (emphasis added), whether or not that duty is calculated according to the ship's capacity or tonnage, if that duty is imposed for the privilege of the ship's entrance or exit from the port.

Even under the broadest reading of the Tonnage Clause, it prohibits only those taxes, fees, or duties imposed *upon a ship* as an instrument of commerce. The Court has never applied the Tonnage Clause to anything but a charge *on a vessel or vessel owner*.[2]

Here, the Port Authority imposes the passenger fee on passengers who travel to and from the Water Street Dock and who take advantage of, or have the ability to take advantage of, the Port Authority's facilities. The Port Authority *does not* impose the passenger fee on vessels or vessel owners, *i.e.*, the ferry boats and the ferry company, and therefore, the passenger fee does not meet the definition of a "duty of tonnage" as

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[2] In the representative cases cited in *Polar Tankers*, the challenged tax, fee, or duty was imposed on the vessel or the vessel owner, not on the cargo or the vessel's passengers. *See Inman S.S. Co. v. Tinker*, 94 U.S. 238 (1876) (invalidating fees imposed on ships of a certain capacity in the harbor of New York); *Cannon v. New Orleans*, 87 U.S. 577 (1874) (invalidating tax upon every vessel that stopped, either by landing or mooring, in the Mississippi River at New Orleans, for the privilege of so landing or mooring); *Steamship Co.*, 73 U.S. 31 (invalidating tax imposed on every ship that entered the Port of New Orleans); *see also Clyde Mallory Lines*, 296 U.S. 261 (challenge to harbor fee imposed upon vessels 500 tons and over to pay for policing of the harbor); *Packet Co. v. St. Louis*, 100 U.S. 423 (1879) (challenge to wharfage dues imposed upon vessels). And in other cases, the Tonnage Clause has been asserted only as a bar to taxes, fees, and duties imposed on vessels or vessel owners. *See, e.g., Captain Andy's Sailing, Inc. v. Johns*, 195 F. Supp. 2d 1157 (D. Haw. 2001) (challenge to ocean recreation management fee and use fee imposed upon vessels); *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 690 F. Supp. 1515 (E.D. La. 1988), *aff'd*, 874 F.2d 1018 (5th Cir.), *amended*, 891 F.2d 1153 (5th Cir. 1989), *cert. denied*, 495 U.S. 932 (1990) (challenge to port and harbor dues imposed upon vessels).

intended by the Framers and as prohibited by the Tonnage Clause. Given that the Court has never interpreted the Tonnage Clause as prohibiting fees charged to *passengers* of vessels, it should not permit the lower courts to interpret the Clause in this manner. The Clause simply does not reach fees or duties imposed upon passengers.

The Court consistently has interpreted the Tonnage Clause "in light of its purpose, a purpose that mirrors the intent of other constitutional provisions." *Polar Tankers*, 129 S. Ct. at 2282. As this Court recognized in *Polar Tankers*, the Tonnage Clause has, as one purpose, the restraint of the States from exercising their taxing powers to the detriment of their sister States. *Id.* (internal citation omitted). The Tonnage Clause prevents the States from evading the prohibition on laying duties on imports and exports by taxing the vessels carrying those imports and exports. *See id.*; *Steamship Co.*, 73 U.S. at 34-35:

> In the most obvious and general sense it is true, those words describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent. The general prohibition upon the States against levying duties on imports or exports would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance. This extension was doubtless intended by the prohibition of any duty of tonnage.

The Tonnage Clause acts as a corollary to the constitutional grant to Congress of the power to regulate interstate and foreign commerce. Samuel Freeman Miller, *Lectures on the Constitution of the United States* 593-94 (1893):

> But it may now be taken to be the settled doctrine of the Supreme Court that only a tax which may be said to be laid for the privilege of a vessel to enter a port can be held to be a tonnage tax. The prohibition against the States' levying a duty of tonnage is intended to prevent any interference with commerce with foreign nations or between one State and another, and is not intended to prevent a rightful assessment to secure a compensation for services rendered to vessels using the waters of a State, such as wharfage and the like.

The passenger fee offends none of the policies that the Framers intended the Tonnage Clause to protect. By charging the passenger fee to passengers riding the ferry, the Port Authority is not indirectly taxing a commodity that it could not tax directly under the Import-Export Clause.[3] And the passenger fee does not inhibit the commerce of passengers riding the ferry company's ferries to and from Bridgeport, Connecticut and Port Jefferson, New York. In fact, as the district court noted, the ferry company did not present any evidence that the inclusion of the passenger fee in the price of the ferry ticket led to a decrease in demand for the ferry company's services or in the ferry company's ridership. App. C at 47a. Instead, the court found that

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[3] U.S. CONST. art. I, § 10, cl. 2.

the ferry's ridership rose steadily for the entire period after the Port Authority first instituted the passenger fee. *Id.* at 48a.

The Tonnage Clause must be interpreted to effectuate the intent of the Framers and not go beyond that intent. Yet the lower courts in the decisions below have done just that. Their interpretation of the Tonnage Clause exceeds permissible bounds and ignores the Clause's intent and purpose.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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